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In the
Supreme Court of the United States

JOSEPH TALIK

Petitioner,

v.

FEDERAL MARINE TERMINALS, INC.

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Ohio

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the exclusivity provisions of the Longshore Harbor Workers' Compensation Act (the "LHWCA"), 33 U.S.C. § 901 et seq., preempt a "twilight zone" longshoreman's state common law employer intentional tort claim that is governed by a "substantial certainty" rather than a deliberate intent standard?

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INTRODUCTION

This case presents important, recurring issues regarding the extent to which Congress preempted injured longshoreman from bringing an employer intentional tort claim under the applicable law of the state in which they were injured.

Joe Talik brought a state common law employer intentional tort claim based upon conduct that, under the law of Ohio, arises outside the course and scope of his employment. As a longshoreman for Federal Marine Terminals, Inc. ("Federal Marine"), Mr. Talik handled cargo passing through the Port of Cleveland. Because he worked with heavy cargo in the vicinity of impressive machinery, Mr. Talik's job entailed an inherent degree of risk. But on the day Mr. Talik lost his right leg, Federal Marine added an unnatural degree of risk such that no reasonable employee would contemplate it being within the course and scope of employment.

Federal Marine seeks to avoid liability for its intentional tort by hiding behind the Longshore Harbor Workers' Compensation Act (the "LHWCA"). Federal Marine will argue the LHWCA contains an "exclusiveness of liability" provision, which limits the liability of longshore employers. However, the LHWCA cannot preempt employer *intentional* torts, which necessarily arise *outside the course of employment*, because the LHWCA encompasses only *accidental* injuries that arise *in the course of employment*. Moreover, the "exclusiveness of liability" provision explicitly limits employer liability to only such accidental injuries that arise in the course of employment and a defined, yet limited (and

inapplicable) set of willful injuries that may be inflicted upon the employee by third parties.

To affirm the Ohio Supreme Court's holding, this Court would have to find that Congress intended that Ohio "twilight zone" longshoremen are deprived of a significant common law employee workplace remedy to redress employer intentional torts, enjoyed by all other Ohio employees, solely because of their status as employees within the reach of the LHWCA. A plain reading of the LHWCA shows that Congress neither explicitly nor implicitly preempted Ohio's common law employer intentional tort cause of action. Moreover, Ohio courts have repeatedly held that an employer intentional tort necessarily arises outside the employment relationship such that employees may recover workers' compensation benefits and damages for employer intentional torts. Accordingly, Mr. Talik respectfully submits that this Court should reverse the Ohio Supreme Court's holding and find that the LHWCA does not preempt Ohio's "substantial certainty" employer intentional tort cause of action.

PETITION FOR A WRIT OF CERTIORARI

The Petitioner respectfully petitions for a writ of *certiorari* to review the opinion of the Ohio Supreme Court decided on March 13, 2008.

OPINIONS BELOW

The order of the Cuyahoga County Court of Common Pleas (Suster, J.) granting Federal Marine's summary judgment motion is reprinted in the

Appendix at 1. and is not otherwise published. The order of the Eight District of Ohio Court of Appeals (McMonagle, J.) reversing the trial court's decision is reprinted in the Appendix at 2. and is not otherwise published. The Ohio Supreme Court's decision reversing the Eighth District and remanding the same is reprinted in the Appendix at 22. and is published as *Talik v. Fed. Marine Terminals, Inc.*, 885 N.E.2d 204 (Ohio 8th Dist. 2008). On remand, the Eighth District held that Federal Marine did not waive the affirmative defense of preemption by failing to raise it in its answer. The Eighth District's decision on remand is reprinted in the Appendix at 44. and is not otherwise published. Mr. Talik will contemporaneously seek a discretionary appeal of the purely state law issue to the Ohio Supreme Court.

JURISDICTION

The Ohio Supreme Court rendered its decision on March 13, 2008. This petition for a writ of certiorari is filed within ninety days of March 13, 2008. Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1247.[1]

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[1] Although the Ohio Supreme Court remanded the issue of whether Federal Marine waived the affirmative defense of preemption, jurisdiction is proper before this Court. *See, e.g., Cox v. Cohn*, 420 U.S. 469 (1975) (finding that even where matters remain to be disposed of by lower state court after highest state court has finally determined federal issue, determination on federal issue may be "final judgment" within meaning of 28 U.S.C. § 1247); *see also Flynt v. Ohio*, 451 U.S. 619 (1981) (same).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. § 902 Definitions.

(2) The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment.

(4) The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).

B. § 903 Coverage.

(a) Disability or death; injuries occurring upon navigable waters of United States.

Except as otherwise provided in this section, compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury

occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel).

(e) Credit for benefits paid under other laws.

Notwithstanding any other provision of law, any amounts paid to an employee for the same injury, disability, or death for which benefits are claimed under this chapter pursuant to any other workers' compensation law or section 688 of Title 46, Appendix (relating to recovery for injury to or death of seamen), shall be credited against any liability imposed by this chapter.

C. <u>§ 904 Liability for Compensation</u>.

(a) Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 907 and 909 of this title. In the case of an employer who is a subcontractor, only if such subcontractor fails to secure the payment of compensation shall the contractor be liable for and be required to secure the payment of compensation. A subcontractor shall not be deemed to have failed to secure the payment of compensation if the contractor has provided insurance for such compensation for the benefit of the subcontractor.

(b) Compensation shall be payable irrespective of fault as a cause for the injury.

D. § 905 Exclusiveness of Liability.

(A) Employer liability; failure of employer to secure payment of compensation.

The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee. For purposes of this subsection, a contractor shall be deemed the employer of a subcontractor's employees only if the subcontractor fails to secure the payment of compensation as required by section 904 of this title.

STATEMENT OF THE CASE

A. Factual Background.

On September 10, 2004, a stack of massive pipes, weighing between 5,000 and 20,000 pounds each, collapsed and crushed Mr. Talik's right leg. The damage was so severe that Mr. Talik's right leg had to be amputated above the knee. Mr. Talik sought redress for his loss, including medical expenses, lost wages, pain and suffering, and punitive and other damages by filing an Ohio common law employee intentional tort claim against Federal Marine in Ohio state court.

On the day of his injury, Mr. Talik and Robert Holchin ("Mr. Holchin") were working as a team to load a variety of goods, including the pipes, onto trucks. Mr. Holchin operated a tow motor to "capture" and move the pipes, and Mr. Talik was the "checker," identifying which pipes should be moved and in what order. The goods had been off-loaded from ships in weeks past and were stored in a warehouse or on docks by other Federal Marine employees and in a manner required by Federal Marine.

On the morning of September 10, 2004, Federal Marine provided Mr. Talik and Mr. Holchin with a daily work list. This was their first notice of work to be done that day. The work list indicated the number of trucks scheduled to arrive and detailed which goods were to be loaded upon them. The work list required the Talik/Holchin team to load 13 trucks. This heavy workload was typical of the heightened production burden placed on the

longshoremen by Federal Marine beginning in the summer of 2004. *See* Affidavit of Joseph Talik (relevant portions in the Appendix at 44. attached hereto as Appendix E). The work list described a full day of work that ruled out any time for breaking down and/or sorting the goods prior to loading. *See* Affidavit of Robert Holchin, in the Appendix at 67. The goods had to be sorted as the loading process took place.

The first truck arrived at 7:45 a.m. and was scheduled to receive a load of pipes for transport to Federal Marine's customer, Specialty Pipe. *See* Appendix 58, 59-60. Two to three weeks earlier, Federal Marine left the massive pipes on its dock in a disorganized five to six feet high and twelve to fifteen feet deep stack. *See* Appendix at 52, 71. Mark Chrzanowski, a warehouse manager for Federal Marine and Mr. Talik's immediate supervisor, knew that loading a truck from a stack of pipes more than one-pipe high while, at the same time, attempting to sort the stack was particularly dangerous. *See* Deposition of Mark Chrzanowski (relevant portions attached hereto in the Appendix at 61). Accordingly, Mr. Chrzanowski recommended that Federal Marine reduce the risk of injury to its employees by unstacking the pipes and laying them flat on the dock. *Id.* at 67.

Breaking down pipe stacks to one-pipe height and sorting the pipe by the size of their outside diameters was done in the past to eliminate the risk of spontaneous collapse and to facilitate loading the pipes onto trucks. In this manner, the first layer of pipe placed on a truck bed would be of uniform outside diameter, resulting in a level base that would safely accommodate another layer on top. *Id.* at 54.

In the two or three week period preceding Mr. Talik's injury, longshoremen repeatedly complained that the pipe stack was not broken down and sorted. *Id.* at 71. Pipe stacks were known to spontaneously collapse, and stacks of this height could not be properly blocked or chocked to prevent collapse. *Id.* Mark Chrzanowski was aware of the risk of injuries to employees when steel pipes were stacked improperly. In fact, he witnessed pipe stacks spontaneously collapse as a result of improper stacking. *Id.* at 61-66, 69.

To begin the loading process, Mr. Talik tried to check the identifying stamps located on the outside rim of the pipes. Pipes of similar outside diameter had to be found; however, they were randomly dispersed throughout the pile. Thus, Mr. Talik had to reach into the stack to measure each pipes' outside diameter. *Id.* at 54-55.

First, Mr. Holchin captured three pipes of the same outside diameter from the stack. *Id.* at 55-56. Mr. Talik stood away from the pipe stack to the left of the pile while Mr. Holchin secured the pipes on his forklift and drove the pipes to the truck. *Id.* at 56-57. The next pipes of similar outside diameter were embedded with shorter pipes around them. *Id.* at 57-58. As Mr. Talik waited for Mr. Holchin to return, he carefully reached around the left side of the pile and placed a measuring tape on the end of the embedded pipe. *Id.* Suddenly, the stack collapsed and crushed Mr. Talik's right leg. When Mr. Holchin returned, he found Mr. Talik trapped under a pipe. *Id.* Perhaps saving Mr. Talik's life, Mr. Holchin used the tow motor to lift the pipe from Mr. Talik's leg. Mr. Talik was admitted to Cleveland Metropolitan General

Hospital, and his right leg was amputated above the knee.

The Occupational Safety and Health Administration ("OSHA") cited Federal Marine for a serious violation. The citation was for failure to comply with 29 CFR 1917.14, which provides, "Cargo, pallets and other material stored in tiers shall be stacked in such a manner as to provide stability against sliding and collapse." The specific violation was that "[i]n the dock area, large pipe was not properly stacked or blocked to prevent collapse or rolling." *Id.*

B. Procedural History.

In November 2004, Mr. Talik filed a Complaint in the Court of Common Pleas for Cuyahoga County, Ohio. Mr. Talik alleged that, under the common law of Ohio established by the Ohio Supreme Court, Federal Marine committed an employer intentional tort by requiring him to load the pipes despite its knowledge that the pipe stack was dangerous and that Mr. Talik was substantially certain to be harmed.[2]

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[2] Mr. Talik filed his employer intentional tort claim before the April 7, 2005 effective date of O.R.C. 2745.01. Accordingly, Mr. Talik's employer intentional tort claim is brought under the requirements the Ohio Supreme Court established in *Fyffe v. Jeno's, Inc.* (1991), 59 Ohio St.3d 115, 570 N.E.2d 1108. In *Fyffe*, the Ohio Supreme Court held that in order to establish "intent" to show a state common law employer intentional tort, an employee must show: (a) knowledge by an employer of the existence of a dangerous process, procedure, instrumentality, or condition within its business operation; (b) knowledge by the employer that if the employee is subjected by his employment to

On November 3, 2005, the trial court granted summary judgment in favor of Federal Marine. In a comprehensive and well-reasoned opinion, the Eighth District Court of Appeals of Ohio reversed. Relying on a host of Ohio Supreme Court cases, including *Blankenship v Cincinnati Milacron Chemicals, Inc.*, 69 Ohio St.2d 608, 433 N.E.2d 608 (Ohio 1982);, *Jones v. VIP Development Co.* (Ohio 1984), 15 Ohio St.3d 90, 472 N.E.2d 1046, and *Fyffe v. Jeno's, Inc.* (Ohio 1991), 59 Ohio St.3d 115, 570 N.E.2d 1108, the Eighth District held that the LHWCA does not preempt a state common law employer intentional tort claim, and a genuine issue of material fact existed as to whether Federal Marine is liable to Mr. Talik. On October 2, 2006, Federal Marine filed its notice of appeal to the Ohio Supreme Court, and the Ohio Supreme Court accepted jurisdiction. The Ohio Supreme Court reversed the Eighth District Court of Appeals and remanded the case back for determination on the issue of waiver of affirmative defense.

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such dangerous process, procedure, instrumentality, or condition, then harm to the employee will be substantial certainty; and (c) the employer, under such circumstances and with such knowledge did act to require the employee to continue to perform the dangerous task. *Id.* Moreover, recently an Ohio appellate court determined that O.R.C. § 2745.01 is unconstitutional because of "its excessive standard requiring proof that the employer intended to cause injury, it is clearly not a law that furthers the comfort, health, safety and general welfare of all employees." *Kaminski v. Metal & Wire Prods. Co.*, 886 N.E.2d 262 (Ohio 7th Dist. 2008).

REASONS FOR GRANTING THE WRIT

The majority of the Ohio Supreme Court erred in determining that the LHWCA preempts a claim for an employer intentional tort based upon the "substantial certainty" standard. This Court should grant *certiorari* because the Ohio Supreme Court's decision on this important question of federal law conflicts with this Court's decision in *Sun Ship v. Pennsylvania*, 447 U.S. 715 (1980). Moreover, the Ohio Supreme Court has decided an important issue of federal law that has not been, but should be, settled by this Court. *See* S.Ct.R. 10(c).

A. THE OHIO SUPREME COURT'S OPINION IS CONTRARY TO DECISIONS OF THIS COURT.

The Ohio Supreme Court accepted jurisdiction and held that the LHWCA preempts Ohio's "substantial certainty" employer intentional tort cause of action but not a similar claim based upon a "deliberate intent" standard. The majority bases this distinction on the fact that if a "substantial certainty" standard is applied in Ohio, it "would be inconsistent with the central purpose underlying the LHWCA to create a 'uniform compensation system." Opinion at ¶ 32. As noted by dissenting Justices Pfeifer and Vukovich, however, this position is "undermined by the federal law itself, because as the majority opinion states, certain injured workers 'may apply for benefits under a state workers' compensations scheme, the LHWCA, or both.'" Opinion at ¶ 12 (*citing* 33 U.S.C. § 903(e)).

Moreover, each state has enacted its own individual workers' compensation schemes, and injured maritime workers are permitted to recover under the applicable state system pursuant to the terms of the LHWCA. Because the various workers' compensation systems differ from state to state, injured longshoremen and harbor workers are permitted to recover differently for their injuries in each of the fifty states. Thus, allowing an injured longshoreman to bring a "substantial certainty" intentional tort claim against his or her employer will not create inconsistency under the LHWCA. In fact, at least seven other states have adopted a "substantial certainty" standard for employer intentional tort claims.[3]

Despite the fact that several states have adopted a "substantial certainty" standard, the Ohio Supreme Court held that only "deliberate intent" standard employer intentional tort claims were not preempted by the LHWCA. The Ohio Supreme Court based its decision on the importance of uniform application of the LHWCA throughout the United States. However, this rationale is undermined because every case allowing an employee to bring an employer intentional tort action borrows the applicable state law standards for employer intentional tort claims. *See, e.g., Sample v. Johnson*, 771 F.2d 1335 (9th Cir. 1985); *Houston v. Bechtel Assocs. Prof'l Corp.*, 522 F.Supp. 1094 (D.D.C. 1981). Moreover, in Ohio, it is well

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[3] The other states that have adopted a "substantial certainty" standard for intentional tort claims are Connecticut, Florida, Louisiana, New Jersey, North Carolina, South Dakota, and Texas. 6 Larson's Workers' Compensation Law (2007) 103-10 § 103.04[1].

established that the "substantial certainty" standard applies to the determination of employer intentional tort claims that arose before April 7, 2005, the effective date of Ohio's intentional tort statute, O.R.C. § 2745.01. The Ohio Supreme Court reversed the Eighth District Court of Appeals and thereby elevated the erroneous objective of "uniform application of the LHWCA within the 50 states" as more essential to the Congressional intent behind the LHWCA than preserving Mr. Talik's state common law cause of action for employer intentional tort. However, "uniformity of application of the LHWCA" as a rationale for depriving a "twilight zone" employee of a supplemental state remedy for workplace injury was rejected by this Court in *Sun Ship*.

This Court stated that to adopt a position mandating exclusive federal jurisdiction would "blunt the thrust of the 1972 amendments, and frustrate Congress' intent to aid injured maritime laborers. We decline to do so in the name of uniformity." *Id.* at 726 (emphasis added). Similarly, here, the purpose of the LHWCA to provide remuneration to injured longshoreman will be frustrated by the opinion of the Ohio Supreme Court. The decision below is clearly unsupported by this Court, and this Court should grant *certiorari* to reevaluate that decision.

B. THE LHWCA DOES NOT PREEMPT THE FIELD OF STATE WORKERS' REMEDIES.

In *Sun Ship*, this Court stated that the LHWCA does not preempt the entire field of state

law remedies for injured longshoremen. The Court's analysis focused largely on the 1972 amendments to the LHWCA, which upgraded the benefits available to employees and extended the LHWCA's coverage to include workers injured in the "twilight zone"—land areas contiguous to waterways to which coverage was previously limited. 447 U.S. at 723-24. The Court explained that this "landward extension" of benefits under the 1972 amendments "cannot fairly be understood as pre-empting state workers' remedies from the field of the LHWCA." *Id.* at 720 (emphasis added).

Rather, Congress clearly intended the LHWCA to be an optional benefits scheme that "*supplements*, rather than supplants, state compensation law." *Id.* (empahsis added); *c.f. State ex rel. Pittsburgh & Conneaut Dock Co. v. Industrial Comm.*, 160 Ohio App.3d 741, 828 N.E.2d 712 (9th Dist. 2005). In *Sun Ship*, this Court wrote:

> To be sure, if state remedial schemes are more generous than federal law, concurrent jurisdiction could result in more favorable awards for workers' injuries than under an exclusively federal compensation system. But we find no evidence that Congress was concerned about a disparity between adequate federal benefits and *superior* state benefits.

Sun Ship, Inc., 447 U.S. at 724.

In other words, the LHWCA is the baseline for compensation to injured workers, and Congress did

not intend to occupy the field of state workers' remedies. *Id.* at 724-725 (stating "[i]ndeed, it is noteworthy that in their discussion of advantages to employers under the 1972 amendments, the [congressional Bill] Reports dwell upon the rejection of the unseaworthiness action, and *do not mention pre-emption of state remedies*") (*citing* S. Rep. No. 92-1125 (1972); H.R. Rep. No. 92-1441 (1972) (emphasis added)).

Federal and state courts have overwhelmingly adopted the precept that the LHWCA "supplements, rather than supplants" state workers' remedies. For example, in *Wallace v. Ryan-Walsh Stevedoring Co., Inc.*, 708 F.Supp. 144 (E.D. Tex. 1989), the court held that a state law retaliatory discharge claim brought by an employee who was injured in the twighlight zone was not preempted by the LHWCA. The court wrote:

> The twilight zone...is a specie of maritime law in which overlapping jurisdictional spheres create concurrent jurisdiction between the LHWCA and state laws. Currently, maritime injuries fall within three jurisdictional spheres. At the seaward extreme, the LHWCA is the exclusive remedy. For injuries occurring on land outside the jurisdictional grasp of the LHWCA, state law alone governs. *In the twilight zone, however, "maritime but local" injuries may be compensated by federal or state law.* *Id.* at 2436. [citations omitted]. Since Carroll Wallace was injured on land,

> yet is covered by the LHWCA, he falls within the twilight zone and *the LHWCA does not pre-empt his state law retaliatory discharge claim.*

Wallace, 708 F.Supp. at 153 (emphasis added).

Similarly, in *Lenane v. Continental Maritime of San Diego, Inc.*, 61 Cal.App.4th 1073 (Cal. App. 4th 1998), the court held that a maritime employee's common law tort claim that his employer knowingly removed or failed to install a guard on a power press was not preempted by the LHWCA. The court embraced *Sun Ship*, holding that the United States Supreme Court has given "free rein" to "twilight zone" workers' right to pursue remedies under state law. *Id.* at 1089.

C. THE 1972 AMENDMENTS DO NOT ENHANCE EMPLOYERS' IMMUNITY FROM STATE LAW CLAIMS OF EMPLOYEES.

As this Court stated in *Sun Ship*, the 1972 amendments to the LHWCA did not include enhanced employer immunity from state law claims as a *quid pro quo* for enhanced employee benefits. Certainly, Congress intended that the LHWCA, like all workers' compensation systems, should provide predictable liability for employers. However, "[t]he thrust of the amendments was to upgrade the benefits" and not to enhance employers' protection from common law tort claims. *Sun Ship*, 447 U.S. at 723 (citation omitted). Specifically, "the *quid pro quo* to the employers for the landward extension of the

LHWCA by the 1972 amendments was simply abolition of the longshoremen's [remedy for injuries resulting from unseaworthy crafts]." *Id.* at 724. Nothing in the amendments gave employers additional protection from common law intentional tort claims.

In *Federal Marine Terminals, Inc. v. Illinois Workers' Comp. Comm. Div.*, 2007 Ill. App. LEXIS 189 (Ill. App. Mar 6, 2007), the court stated, "the only identifiable benefit to employers intended by Congress in the enactment of the 1972 amendments to the LHWCA was the elimination of the longshoremen's strict liability remedy against ship owners for injuries resulting from a craft's unseaworthiness." Thus, the *quid pro quo* for the 1972 amendments was not strengthened employer immunity.

D. THE EXPRESS LANGUAGE OF THE LHWCA DOES NOT PREEMPT OHIO'S COMMON LAW INTENTIONAL TORT CAUSE OF ACTION.

In determining whether the LHWCA preempts Ohio's common law cause of action for a "substantial certainty" employer intentional tort, this Court's focus must be on Congress' purpose in enacting the LHWCA. *See Malone v. White Motor Corp.* (1978), 435 U.S. 497, 504. The coverage and definitional sections of the LHWCA leave no room for debating the LHWCA's scope of coverage and explicitly define Congress's purpose in enacting it. 33 U.S.C. § 903(a) provides that coverage exists "*only* if the disability or death results from an *injury* occurring upon the navigable waters of the United States (including any

adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel)." *Id.* Thus, a prerequisite to coverage under the LHWCA is that a maritime worker suffers an "injury."

The LHWCA defines "injury" as "*accidental* injury or death arising out of and *in the course of employment*...and includes the willful act of a *third person* directed against an employee *because of his employment*." 33 U.S.C. § 902(a) and 902(2) clearly express Congress's purpose that coverage under the LHWCA should exist only where a maritime employee has suffered an "accidental" (as opposed to intentional) injury that arose "in the course of employment" (as opposed to merely at the job site). *See Blankenship*, 69 Ohio St.2d at 614, n.8 ("Indeed, it would be travesty on the use of the English language to allow someone who intentionally inflicts an injury on another to call the injury a work incident."). Moreover, Congress considered even "the willful act of a third person" (such as a co-worker) not to be a covered injury unless the act was directed at an employee "because of his employment." 33 U.S.C. § 902(2). These clauses express, in harmony, that an intentional tort suffered outside the course of employment is beyond the scope of the LHWCA and that Congress's purpose in enacting the LHWCA was not to provide the exclusive remedy for employees against their employers.

Thus, a plain reading of the LHWCA reveals that Congress did not expressly preempt employer intentional tort claims. *See Taylor v. Transocean Terminal Operators, Inc.*, 785 So.2d 860, 863

(La.App. 2001), *cert. denied.* 534 U.S. 1020 (stating "[B]ecause the LHWCA provides benefits only for injuries caused by (1) accidents, (2) occupational disease and (3) willful acts of third persons (and *"third persons" does not include employers*)[4], and an intentional tort by an employer fits none of these categories, the LHWCA does not provide any benefits for injuries caused by an intentional tort by an employer"); *c.f. Blankenship*, 69 Ohio St.2d at 614, n.8 ("An intentional tort...is clearly not an 'injury' arising out of the course of employment").

Moreover, 33 U.S.C. § 905—the LHWCA's "exclusiveness of liability" section—does not proscribe a covered employee's ability to bring a state common law employer intentional tort claim. Under that section, Congress established that the liability of employers to their maritime employees is limited to the benefits provided under the LHWCA. But the limit applies *as to only injuries covered under the LHWCA.* 33 U.S.C. § 905 provides:

> (a) Employer liability; failure of employer to secure payment of compensation. The liability of an employer *prescribed in section 4 33 U.S.C. § 904* shall be exclusive and in place of all other liability of such employer to the employee...

---

[4] *See* 33 U.S.C. § 902(4) ("The term 'employer' means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).").

Id. (emphasis added). Thus, the "exclusiveness of liability" section is qualified by 33 U.S.C. § 904, which provides:

> (a) Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 7, 8, and 9 [33 USCS §§ 907, 908, and 909];
>
> (b) Compensation shall be payable irrespective of fault as a cause for the *injury*.

Id. (emphasis added).[5]

The Ohio Supreme Court and Federal Marine, however, read out this qualification. Only in so doing can one reach the erroneous presumption that 33 U.S.C. § 905 (a) evidences Congress's intent to preempt an employer intentional tort. Pursuant to 33 U.S.C. § 905(a), the exclusivity, from which Federal Marine attempts to manufacture express preemption, applies to only the liability of an employer as to compensation payable for an "injury."

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[5] 33 U.S.C. § 907 provides, "The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of *the injury* or the process of recovery may require." *Id.* (a) (emphasis added).

33 U.S.C. § 908 sets forth compensation payable for "permanent total disability," "temporary total disability," "permanent partial disability," and "temporary partial disability" and sets forth various procedural requirements and limits related to "the injury." 33 U.S.C. § 908 (c)(13)(D), (c)(22), (d)(1), (e), (f)(1), (g), and (h).

33 U.S.C. § 909 sets forth benefits payable "[i]f *the injury* causes death." 33 U.S.C. § 909 (emphasis added).

In other words, 33 U.S.C. § 905(a) applies to only an "accidental" injury that occurred "in the course of employment" and does not exclude coverage for employer intentional torts. See Taylor, 785 So.2d at 863 ("Because the LHWCA's benefit provisions do not apply to injuries caused by employer intentional torts, it logically follows that [the] LHWCA's exclusive remedy provision does not apply to an employer intentional tort"). Accordingly, 33 U.S.C. § 905 (a) does not take employer intentional tort causes of action away from employees.

CONCLUSION

For all of the reasons identified herein, a writ of certiorari should issue to review the opinion of the Ohio Supreme Court and, ultimately, to vacate and reverse this judgment. The explicit language of the LHWCA expresses Congress's clear intent that only common law actions based on accidental injuries arising in the course of employment are preempted. As this limited preemption does not include a common law action for employer intentional tort, Congress did not intend to preempt employer intentional tort causes of action. Moreover, the Ohio Supreme Court's Opinion conflicts with the express language of the LHWCA and makes a decision on an important question of federal law that is at odds with precedent established by this Court in Sun Ship. Accordingly, Mr. Talik respectfully submits that this Court should accept certiorari to reverse the holding of the Ohio Supreme Court.

APPENDIX

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Supreme Court, U.S.
FILED

JUN 10 2008

OFFICE OF THE CLERK
William K. Suter, Clerk

No. 08-4

In the
Supreme Court of the United States

JOSEPH TALIK

Petitioner,

v.

FEDERAL MARINE TERMINALS, INC.

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Ohio

---

APPENDIX TO JOSEPH TALIK'S PETITION FOR WRIT OF CERTIORARI

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Attorneys for Petitioner

June 9, 2008

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

JOSEPH TALIK	Case No: CV-04-546597
Plaintiff,	Judge: RONALD SUSTER
FEDERAL MARINE TERMINALS, INC. ET AL	**JOURNAL ENTRY**
Defendant.	

96DISP.OTHER-FINAL

MOTION OF FEDERAL MARINE TERMINALS INC. (FILED 06/02/2005) FOR SUMMARY JUDGMENT IS GRANTED. THE COURT, HAVING CONSIDERED ALL THE EVIDENCE AND HAVING CONSTRUED THE EVIDENCE MOST STRONGLY IN FAVOR OF THE NON-MOVING PARTY, DETERMINES THAT REASONABLE MINDS CAN COME TO BUT ONE CONCLUSION, THAT THERE ARE NO GENUINE ISSUES OF MATERIAL FACT, AND THAT FEDERAL MARINE TERMINALS INC. IS ENTITLED T JUDGMENT AS A MATTER OF LAW. FINAL.

COURT COSTS ASSED TO THE PLAINTIFF(S).

/s/Ronald Suster 8/26/05

Judge Signature Date

COURT OF APPEALS OF OHIO
EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 87073

JOSEPH TALIK,	:	
	:	
Plaintiff-Appellant	:	JOURNAL ENTRY AND
	:	OPINION
v.	:	
	:	
FEDERAL MARINE TERMINALS, INC.,	:	
	:	
Defendant-Appellee	:	

DATE OF ANNOUNCEMENT OF DECISION: AUGUST 3, 2006

CHARACTER OF PROCEEDING: Civil Appeal from Common Pleas Court, Case No. CV-546597

JUDGMENT: REVERSED AND REMANDED.

DATE OF
JOURNALIZATION: August 14, 2006

APPEARANCES:

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CHRISTINE T. McMONAGLE, J.:

Plaintiff-appellant, Joseph Talik ("Talik"), appeals the trial court's judgment granting summary judgment in favor of defendant-appellee, Federal Marine Terminals, Inc. ("Federal Marine").

Federal Marine employs longshoremen for its cargo handling operations on waterways, including the Great Lakes. Talik, one of Federal Marine's longshoremen, suffered a workplace injury on September 10, 2004, while working at the Port of Cleveland. Specifically, the injury occurred when a stack of pipes collapsed and fell on Talik's right leg, and resulted in amputation of the leg. As a result of his injury, Talik filed a lawsuit in Common Pleas Court seeking damages from Federal Marine under a common law employer intentional tort theory.

Federal Marine filed a motion for summary judgment in which it contended that the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA" or "the Act") preempted Talik's state law tort claim. Alternatively, Federal Marine argued that even if Talik's state law tort claim was not preempted by the LHWCA, he failed to satisfy his burden of proof for such a claim. The trial court granted Federal Marine's motion for summary judgment.[1] Talik appeals, raising two assignments of error for our review.

In his first assignment of error, Talik contends that the trial court erred in granting summary judgment in favor of Federal Marine because his

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[1] The Court's entry does not specify upon which of Federal Marine's arguments it based its grant of summary judgment.

intentional tort claim was not preempted by the Act. We agree.

Summary judgment is appropriate pursuant to Civ. R. 56(C) when (1) there is no genuine issue as to any material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) construing the evidence most strongly in favor of the nonmoving party, reasonable minds can come to only one conclusion, and that conclusion is adverse to the part against whom the motion for summary judgment is made. *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66, 375 N.E.2d 46. Our standard of review on summary judgment is de novo. *Jones v. Shelly Co.* (1995), 106 Ohio App.3d 440, 445, 666 N.E.2d 316.

33 U.S.C. §902(2) of the LHWCA provides that " 'injury' means accidental injury or death arising out and in the course of employment, and such occupation disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by willful act of a third person directed against an employee because of his employment."

Further, 33 U.S.C. §905(a) of the LHWCA reads as follows:

"(a) Employer liability; failure of employer to secure payment of compensation. The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer

fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the chapter or to maintain an action at law or admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee. For purposes of a subcontractor's employees only if the subcontractor fails to secure the payment of compensation as required by section 904 of this title."

Federal Marine argues that 33 U.S.C. §905(a) provides the exclusive remedy for covered workers and embodies Congress' intention for employers to provide no-fault compensation in return for immunity from tort liability.[2] Talik, on the other hand, argues that there is an intentional tort exception to the otherwise exclusive provisions of 33 U.S.C.§905(a), when read in tandem with 33 U.S.C. §902(2). Specifically, Talik contends that:

"There is no express inclusion of the concept of an 'intentional tort' in the definition of 'injury' except that the concept of a 'willful act' is included if the injury arises from the actions of a 'third party.' Significantly, the definitional section of the LHWCA does not equate the identity of a 'third party' with that of the employer. See, 33 U.S.C. §902."

In support of his argument, Talik relies upon a Fourth Circuit Court of Appeals case, *Taylor v.*

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[2]Talik applied for and received Ohio workers' compensation benefits and Federal Marine also opened a file on Talik's behalf for federal benefits under the LHWCA.

Transocean Terminal Operators, Inc. (2001), 785 So.2d 860. In that case, the court held that Taylor, a longshoreman who was stabbed at work by a fellow employee, had properly filed an intentional tort claim because the exclusive remedy provision of the LHWCA was not applicable to an intentional tort by or attributable to the defendant/employer.

In so holding, the Fourth Appellate Circuit noted that:

"The notion that a claim for an intentional tort committed by employer is an exception to a statutory exclusive remedy compensation scheme is familiar in the context of Louisiana's worker's compensation law. Louisiana's worker's compensation statute provides that it does not affect the liability of the employer for civil liability resulting from an intentional act. La. R.S. 23:1032.B. Thus, it has been held that an intentional tort by an employer is not subject to the "exclusive remedy" provision of Louisiana's workers' compensation law and may give rise to a tort action by the employee against the employer. See, e.g., *Bazley v. Tortorich,* 397 So.2d 475 (La. 1981). This is typical of state worker's compensation laws. *Bazley*, 397 So.2d at 480 (citing 2A Larson, The Law of Workmen's Compensation §§ 68-69 (1976)." Id. at 862.

The United States Supreme Court has held that the LHWCA is a typical workers' compensation program. *Northeast Marine Terminal Co. v. Caputo* (1977), 432 U.S. 249, 97 S.Ct. 2348.

In *Blankenship v. Cincinnati Milacron Chemicals, Inc.* (1982), 69 Ohio St.2d 608, 433 N.E.2d 572, the Supreme Court of Ohio determined that the immunity bestowed upon employers under Ohio's workers' compensation laws did no reach

intentional torts committed by an employer. The Court reasoned that an employer's intentional tort occurs outside the employment relationship. In *Jones v. VIP Dev. Co.* (1984), 15 Ohio St.3d 90, 472 N.E.2d 1046, the Court clarified that an injury that is the product of an employer's intentional tort is one of that also "arises out of and in the course of employment" and, thus, an injured worker may both recover under the workers' compensation system and pursue an action against his or her employer for intentional tort. See, also, *Brady v. Safety-Kleen* (1991), 61 Ohio St.3d 624, 576 N.E.2d 722, paragraph one of the syllabus.

Thus, because the LHWCA is a workers' compensation program, and because in Ohio an employee may maintain a workers' compensation claim and an intentional tort claim, we hold that the LHWCA does not preempt Talik's state law claim.

We find the cases cited by Federal Marine distinguishable from this case. For instance, in *Cornell v. Parson Coal Co.* (1993), 96 Ohio App.3d 1, the employee filed an intentional tort complaint for on-the-job injuries. The employee dismissed the complaint, and upon refilling, asserted claims for negligence, gross negligence and intentional tort. On the first day of trial, the employee announced that he was going to proceed on a claim of negligence under the federal law found in the LHWCA. The employer objected to the new theory of liability. The trial then proceeded on the intentional tort claim. The jury rendered a verdict on the employer's behalf and the employee appealed to the Seventh Appellate District. The court of appeals reversed the trial court on the claim of negligence, finding that the trial court

should have permitted the employer to proceed on the negligence claim under the LHWCA.

On remand, the employer filed a motion for summary judgment, in which it argued that the employee was not entitled to proceed on his negligence claim under the Act. The trial court granted the employer's motion and the employee appealed, contending that the employer's ground for summary judgment was an affirmative defense, that was not raised by way of a pleading and, thus, was waived. The Seventh District held that the negligence claim could go forward only if the employee established that the employer had failed to secure the necessary workers' compensation coverage. The court did not address the appropriateness of an intentional tort claim in light of the exclusivity provisions of the LHWCA.

Similarly, in *White v. Bethlehem Steel Corp.* (1995), 900 F.Supp. 51, also cited by Federal Marine, the Fourth Circuit Court of Appeals did not address the issue of the appropriateness of an intentional tort claim in light of the exclusivity provisions of the LHWCA. Rather, the court considered whether a borrowed servant of Bethlehem Steel was precluded from asserting a negligence claim against it in light of the Act.

In another case cited by Federal Marine, *Hall v. C&P Tel. Co.* (C.A.D.C.1986), 793 F.2d 1354, the Court of Appeals for the District of Columbia considered the issue of whether the District's workers' compensation act precluded the employee from asserting a civil claim against an employer in addition to a workers' compensation claim.

Other cases cited by Federal Marine relate to claims relative to the administration of benefit

payments under the Act. See *Atkinson v. Gates, McDonald & Co.* (1987), 665 F.Supp. 516; *Daley v. Aetna Cas. And Sur. Co.* (1988), 61 Ohio App.3d 721; *Texas Emp. Ins. Assn. v. Jackson* (1987), 820 F.2d 1406; and *Kelly v. Pittsburgh & Conneaut Dock Co.* (C.A.6, 1990), 900 F.2d 89.

For example, in *Daley,* supra, this court held that the LHWCA preempted state law claims. The issue in that case, however, was a limited one and distinguishable from the issue in this case. In *Daley,* the plaintiff sued the carrier who insured his employer's liability under the Act, for bad faith and intentional infliction of emotional distress when his total temporary disability payments were discontinued. In finding preemption as to the plaintiff's claims, this court noted that specific provisions of the Act, namely Section 914(c)-(f), 928, and 931(a)-(c), allow insurers to discontinue payments and set forth the procedure for same and the penalties for a wrongful discontinuation. This court noted that "*[t]hese provisions* comprise a comprehensive regulation of the manner by which an employer or insurer may contest its liability[,]" and thus found preemptive intent. (Emphasis added) Id. at 724. In finding preemptive relative to the above-mentioned provisions, this court noted that "[i]t is questionable whether an express intent to preempt state claims *** may be gleaned from Section 905(a), considered alone." Id.

In this case, Talik alleged a totally different tort (i.e., an intentional tort) than did the plaintiff in *Daley* (i.e., bad faith and intentional infliction of emotional distress). The intentional tort is not covered under Ohio workers' compensation law, nor is it specifically mentioned and resolved in the

LHWCA. The intentional tort is, therefore, not preempted by the Act.

We note the United States Supreme Court case of *Morrison-Knudsen Construc. Co. v. Director, Officer of Workers' Comp. Programs, U.S. Dept of Labor* (1983), 461 U.S. 624, 103 S.Ct. 2045, cited by Federal Marine, and the language therein. The Court, however, did not consider the specific issue of whether an employee can maintain an intentional tort claim in light of the LHWCA. Rather, the issue before the Court in *Morrison-Knudsen* was whether Congress intended to include employer contributions to union trust funds in the Act's definition of "wages."

Accordingly, we find that Talik's intentional tort claim was not preempted by the LHWCA and sustain his first assignment of error.

In his second and final assignment of error, Talik argues, alternatively, that if the LHWCA preempts his intentional tort claim, the trial court still erred in granting Federal Marine's motion for summary judgment because the exclusivity provisions of the Act are in the nature of an affirmative defense, and were waived by Federal Marine because they were never raised as such. Because we find that Talik's intentional tort claim is not preempted by LHWCA, his second assignment of error is moot and we decline to address it. See App.R. 12(A)(1)(c).

We consider a final issue, however, not assigned as an error by Talik, but raised by Federal Marine in its brief before this court and in its motion for summary judgment in the trial court.[3] In

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[3]The crux of Federal Marine's argument in its motion for summary judgment was that Talik's intentional tort claim was preempted by the LHWCA. However, as previously

particular, Federal Marine argues, alternatively, that if Talik's intentional tort claim is not preempted by the Act, then the federal "deliberate" or "specific" intent standard, rather than the Ohio "substantial certainty" standard applies to his claim. Federal Marine cites *Hess v. Norfolk Southern Ry. Co.* (2005), 106 Ohio St.3d 389, in support of its argument. *Hess* sued the employer railroad company in the state trial court under the Federal Employers' Liability Act ("FELA"). The Supreme Court of Ohio held that the substantive law is the federal law in actions filed under the FELA. Here, Talik did not sue under the LHWCA; rather, he brought an independent intentional tort claim, and stat law governs.

In *Fyffe v. Jeno's, Inc.* (1991), 59 Ohio St.3d 115, 570 N.E.2d 1108, the Supreme Court of Ohio set out the test used to determine whether an employer has committed an intentional tort. In such a case, the plaintiff must prove:

"1) knowledge by the employer of the existence of a dangerous process, procedure, instrumentality or condition within its business operation;

"2) knowledge by the employer that if the employee is subject by his employment to such dangerous process, procedure, instrumentality, or condition, then harm to the employee will be a substantial certainty; and

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mentioned, Federal marine did argue that even if Talik's claim was not exempted, he failed to demonstrate an intentional tort. The trial court did not specify the grounds upon which it granted Federal Marine's motion. Moreover, Talik filed a motion for summary judgment, wherein he argued that pursuant to *Fyffe*, there was no genuine issue of material fact on his intentional tort claim and, thus, he was entitled to judgment as a matter of law.

"3) that the employer, under such circumstances, and with such knowledge, did act to require the employee to continue to perform the dangerous task. Id. at 118.

According to *Fyffe,* a plaintiff must offer proof beyond that required for negligence, or recklessness. Id. In the absence of direct evidence of intent, a plaintiff may prove such a claim by inferred intent. Id.

The Ohio legislature passed R.C. 2745.01, effective October 20, 1993. This legislation was intended to revise the requisite elements and standards of an employer intentional tort. The statute, however, was found to be unconstitutional because it imposed excessive standards and a heightened burden of proof for plaintiffs seeking a remedy for an employer intentional tort. See Johnson v. BP Chem., Inc., 85 Ohio St. 3d 298, 1999-Ohio-267, 707 N.E. 2d 1107 ("Because R.C. 2745.01 imposes excessive standards (deliberate and intentional act), with a heightened burden of proof (clear and convincing evidence), it is clearly not a "law that furthers the *** comfort, health, safety, and general welfare of all employees.'" Id. at 1114 (citation omitted).

Since that time, the Ohio legislature repealed R.C. 2745.01 and passed H.B. 498, revising R.C. 2745.01 effective April 4, 2005. The revised structure is less stringent than the former. The inquiry in this case occurred on September 10, 2004, and Talik filed his action on November 1, 2004. Hence, there is no controlling statute, and *Fyffe* and its progeny control our determination.

In support of his motion for summary judgment relative to his intentional tort claim

pursuant to *Fyffe*, Talik submitted, among other items, the following evidentiary materials: his affidavit; excerpted deposition testimony from his immediate supervisor, Mark Chrzanowski; Federal Marine's "Injury/Death or Illness Investigation Report"; five coworkers affidavits; and an expert's report.

In its brief in opposition to Talik's motion for summary judgment, Federal Marine first challenged the five coworkers' affidavits. Specifically, Federal Marine pointed out that Talik's counsel contacted coworkers, without notice to it, and questioned them under oath in the presence of a court reporter. Their testimony was later transcribed and purportedly summarized in their affidavits.

Upon discovering that the "secret interview," as Federal Marine referred to them, had been conducted, Federal Marine sought, and received, disclosure of the transcripts of the sworn testimony. Federal Marine argued that the affidavits reflected neither the sworn testimony given by the coworkers, nor their subsequent deposition testimony. Thus, Federal Marine argued that the trial court should not consider the affidavits. Federal Marine further argued that the trial court should not consider the affidavits because they contained inconsistent or contradictory statements from the transcripts of the interview and the subsequent deposition testimony of the coworkers.

Initially, we find that the affidavits were property before the trial court for its consideration. That means by which Talik's counsel obtained the affidavits did not render them unacceptable evidentiary evidence pursuant to Civ.R. 56. The

affidavits were sworn to by each of the coworkers and, thus, adopted as their statements.

In regard to Federal Marine's argument about the inconsistencies or contradictions in the affidavits as compared to the transcripts of the interview, the coworkers' sworn testimony has not been made a part of the record for our review, and thus, we are unable to compare the alleged offending statements.

The depositions of the coworkers, however, are part of the record. Upon review of those depositions in comparison with the affidavits, we find that several of alleged inconsistencies or contradictions really are not inconsistencies or contradictions. For example, one of the coworkers, averred in his affidavit as follows:

"I am aware that Joe [Talik] and Bob [Talik's partner on the day of the accident] had complained to Mark Chrzanowski [their supervisor]over the course of two to three weeks that they needed time to properly break down and sort that pile."

Federal Marine points to that same coworker's deposition testimony, wherein he testified that "I wasn't present when Joe and Bob talked to Mark directly." These two statements, however, are not inconsistent or contradictory. The coworker did not aver in his affidavit that he was present when Talik and his partner complained to Federal Marine's management; he only averred that he was aware that complaints had been made.

In regard to other statements provided by the coworkers that arguably could be inconsistent or contradictory, we note that, generally, inconsistencies in a party or witness's affidavit, as compared to deposition testimony, creates a questions of creditability to be resolved by the trier of

fact. See *Turner v. Turner* (1993), 67 Ohio St.3d 337, 617 N.E. 2d1123, paragraph one of the syllabus.

Thus, not only were the affidavits properly before the court, they, along with the deposition testimony, created a genuine issue of material fact.

Secondly, Federal Marine, in opposition to Talik's motion for summary judgment, challenged the opinions of Talik's expert. On this issue, we agree with Federal marine.

Evid.R. 702 provides:

"If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

Additionally, Evid.R. 704 provides:

"Testimony in the form of an opinion or inference otherwise admissible is not objectionable solely because it embraces an ultimate issue to be decided by the trier of fact."

Thus, Evid.R. 702 and 704 permit expert testimony on the ultimate issue to be determined by the trier of fact if (1) the witness is qualified as an expert and (2) scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to decide an issue of fact. *Lee v. Baldwin* (1987), 35 Ohio App.3d 47, 49; *McQueen v. Goldey* (1984), 20 Ohio App.3d 41, 48. While testimony on an ultimate issue to be decided by the trier of fact is not per se inadmissible, it is within the discretion of the trial court to refuse to admit the testimony of an expert witness on an ultimate issue where the expert's testimony is not essential to the trier of fact's understanding of the

issue and the trier of fact is capable of coming to a correct conclusion without it. *Bostic v. Connor* (1988), 37 Ohio St.3d 144, paragraph three of the syllabus. Further, "an expert may not offer an opinion which embraces the 'ultimate issue' if that opinion is essentially a bare conclusion significantly lacking in supporting rationale." *Gannett v. Booher* (1983), 12 Ohio App.3d 49, 52.

Here, Talik's expert opined that Federal Marine "knew" the following: "that stacking pipe without blocking, or other means of positive support was improper and created a dangerous workplace;" "that said improperly stacked pipe could release, without warning causing the pile to collapse;" and "with a substantial degree of certainty, that said collapsing pile would result in injury to personnel[.]"

In *Wesley v. Northeast Ohio Regional Sewer Dist.* (Feb. 22, 1996), Cuyahoga App. No. 69008, this court affirmed the trial court's exclusion of the plaintiff's expert's affidavit in an intentional tort action. In so holding, this court noted that "[a]\ review of the expert's affidavit and supporting evidence shows it to be replete with conclusory statements regarding NEORSD's knowledge." Id. at 13. The Twelfth Appellate District similarly stated in *Sanfrey v. USM Corp.* (Dec. 17, 1990), Clinton App. No. CA90-02-003, that the expert's "credentials did not qualify him to testify as to the mindset or knowledge of [the employer's] or its employees at the time of the accident." Id. at 14-15.

Thus, we find that the opinions expressed in Talik's expert report regarding what Federal Marine "knew" (or "should have known") were not proper.

That notwithstanding, we find that the other evidence in the record still created a genuine issue of

material fact to be litigated. We have already referenced the coworkers' affidavits and deposition testimony. Additionally, we note the deposition testimony of Talik's supervisor, Mark Chrzanowski (that he was aware of the risks associated with handling a stack of pipes, had witnessed a spontaneous collapse of such a stack of pipes, prior to the accident, Talik had complained to him and that he had, prior to Talik's accident, made recommendations to Federal Marine, to improve the safe handling of the pipes); Federal Marine's "Injury/Death or Illness Investigation Report" (indicating the responsible party for the injury was Federal Marine, that the accident occurred during Talik's normal work duties, that the accident occurred when "Joe was standing in front of a pile that was not stable and some pipe shifted trapping Joe's leg," and that "management issues – inadequate procedures" played a part in the accident); Talik's affidavit and deposition testimony (that in the two to three week period leading up to his accident, he complained to Chrzanowski about the working conditions); and the experts' opinions (that the pipes were improperly stacked).

Accordingly, we find that the trial court erred in granting Federal Marine's motion for summary judgment.

Judgment reversed.

This cause is reversed and remanded for further proceedings consistent with the opinion herein.

It is, therefore, ordered that appellant recover from appellee costs herein.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

/s/ Christine T. McMonagle
Christine T. McMonagle
Judge

KENNETH A. ROCCO, J. CONCURS.
COLLEEN CONWAY COONEY, P.J., DISSENTS WITH DISSENTING OPINION

N.B. This entry is an announcement of the court's decision. See App.R. 22(b), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order for the court pursuant to App.R. 22 (E) unless a motion for reconsideration is filed with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).

COURT OF APPEALS OF OHIO EIGHTH DISTRICT
COUNTY OF CUYAHOGA
NO. 87073

JOSEPH TALIK	:	
	:	
Plaintiff-Appellant	:	DISSENTING
	:	
vs.	:	OPINION
	:	
FEDERAL MARINE TERMINALS, INC.	:	
	:	
Defendant-Appellee		

DATE: AUGUST 3, 2006

COLLEEN CONWAY COONEY, P.J., DISSENTING:

I respectfully dissent.

I would affirm the trial court's grant of summary judgment because the LHWCA preempts Talik's state law tort claim.

I would follow the precedent set in *Daley v. Aetna Cas. & Sur. Co.* (1988), 61 Ohio App.3d 721, in which we found an employee's bad faith and intentional infliction of emotional distress claims preempted by the LHWCA. We found Section 905(a) of the LHWCA provides immunity to the employer and the insurance provider. We chose to adopt the

view of the Fifth Circuit and held "that preemptive intent is apparent from both the pervasiveness of the federal regulation and the likelihood of conflicts between state and federal law." Id. at 724.

Moreover, another Ohio case found that the LHWCA places a burden on a plaintiff-employee to establish, as a prerequisite to pursuing an action at law, that the employer failed to secure payment of compensation for the employee. *Cornell v. Parsons Coal Co.* (1993), 96 Ohio App.3d 1, 4.

In the instant case, Talik has failed to sustain his burden to show that his employer failed to secure compensation for him. Therefore, I would affirm the trial court's grant of summary judgment because the LHWCA provides the exclusive remedy for Talik's claim.

[Cite as Talik v. Fed. Marine Terminals, Inc., 117 Ohio St.3d 496, 2008-Ohio-937.]

TALIK, APPELLEE, v. FEDERAL MARINE TERMINALS, INC., APPELLANT.

[Cite as *Talik v. Fed. Marine Terminals, Inc.*, 117 Ohio St.3d 496, 2008-Ohio-937.]

Federal law - Preemption of state law - Longshore and Harbor Workers' Compensation Act, Section 901 et seq., Title 33, U.S.Code - Federal act preempts Ohio common-law action for employer intentional tort based on substantial certainty - Ohio common-law intentional tort based on substantial certainty poses obstacle to accomplishment and execution of full purposes of federal act.

(No. 2006-1 808 - Submitted September 18, 2007 - Decided March 13, 2008.)

APPEAL from the Court of Appeals for Cuyahoga County,

No. 87073, 172 Ohio App.3d 704, 2006-Ohio-3979.

SYLLABUS OF THE COURT

The Longshore and Harbor Workers' Compensation Act, Section 901 et seq., Title 33, U.S.Code, preempts a claim under Ohio law alleging that the claimant's employer caused an injury through an intentional act committed with the belief that injury was "substantially certain" to occur.

LAZINGER, J.

{¶ 1} In this case, we are asked to determine whether the Longshore and Harbor Workers' Compensation Act ("LHWCA"), Section 901 et seq., Title 33, U.S. Code, preempts a claim under Ohio law alleging that the claimant's employer caused an injury through an intentional act committed with the belief that injury was "substantially certain" to occur. We hold that the federal law preempts a claim against an employer for intentional tort based upon substantial certainty.

I. Case Background

{¶ 2} Appellee Joseph Talik worked as a longshoreman for appellant Federal Marine Terminal, Inc., at the port of Cleveland. On September 10, 2004, when Talik and a coworker were

assigned to load pipe from Dock 26 onto trucks, Talik was injured by a collapsing stack of pipes that fell on his right leg.

{¶ 3} As a longshoreman, a maritime worker who worked on land adjoining navigable waters, Talik was covered by the LHWCA. As a worker in the "twilight zone," he had the option of obtaining benefits under the LHWCA or the state workers' compensation act because his employer was required to pay into the state system, R.C. 4123.35, and to secure insurance pursuant to the LHWCA. Section 932(a), Title 33, U.S. Code. Talik received his benefits from the Ohio Bureau of Workers' Compensation.

{¶ 4} Talik also filed a common-law cause of action in the Cuyahoga County Court of Common Pleas, alleging that his employer had committed a "substantial certainty" intentional tort. Federal Marine filed a motion for summary judgment, arguing that Section 905(a), Title 33, U.S. Code preempted this claim. Federal Marine also relied on federal common law to argue that if its immunity was not complete, a showing of Federal Marine's deliberate, specific intent to injure Talik was

required before it could be held liable. The trial court granted summary judgment to Federal Marine, and Talik appealed.

{¶ 5} On appeal, the Eighth District Court of Appeals reversed, reasoning that because the LHWCA is a typical workers' compensation program and because an injured employee in Ohio is not precluded from maintaining both a workers' compensation claim and an intentional tort claim, Talik's intentional tort claim was not preempted by the federal statute.[1] *Talik v. Fed. Marine Terminals*, 8th Dist. No. 87073, 172 Ohio App.3d 704, 2006-Ohio-3979, 876 N.E.2d 1246, ¶ 16. The court of appeals also determined that Ohio law governs because Talik did not sue Federal Marine under the LHWCA. Id. at ¶ 28.

{¶ 6} We accepted this discretionary appeal[2] to determine whether the LHWCA, by providing employer immunity from certain claims, preempts an

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[1] Talik argued in his second assignment of error that Federal Marine failed to raise the LHWCA as an affirmative defense. The Eighth District found this assignment of error to be moot and declined to address it.

[2] Before oral argument, Talik filed a motion to strike portions of Federal Marine's reply brief. That motion is denied.

employee's state common-law claim for an intentional tort based on substantial certainty.

{¶ 7} Our discussion will first examine the federal statute and then Ohio's intentional tort law before determining the preemption issue.

II. The Longshore and Harbor Workers' Compensation Act

{¶ 8} The Longshore and Harbor Workers' Compensation Act, Section 901 et seq., Title 33, U.S. Code, entitles certain workers such as longshoremen injured in the course of their employment to compensation from their employer, regardless of whether the employer's negligence caused the injuries. Thus, the LHWCA is a typical workers' compensation act.

{¶ 9} The LHWCA was enacted by Congress in 1927 in response to decisions by the United States Supreme Court limiting the authority of the states to apply their workers' compensation laws to injured maritime employees. *Morrison-Knudsen Constr. Co. v. Dir., Office of Workers' Comp. Programs, U.S. Dept. of Labor* (1983), 461 U.S. 624, 640, 103 S.Ct. 2045, 76 L.Ed.2d 194 (Marshall, J., dissenting). The act originally provided compensation for injuries

"occurring upon the navigable waters of the United States * * * if recovery * * * through workmen's compensation proceedings may not validly be provided by State law." Former Section 903, Title 33, U.S. Code, 44 Stat. 1426.

{¶ 10}Although it was clear that maritime workers who sustained injuries "upon the navigable waters" were within the LHWCA's exclusive jurisdiction, the same could not be said for maritime workers who were injured while working on land. Questions began to arise over jurisdiction and the exact point at which state remedies gave way to federal remedies. *Davis v. Dept. of Labor & Industries of Washington* (1942), 317 U.S. 249, 253-254, 63 S.Ct. 225, 87 L.Ed. 246. To protect longshoremen from the consequences of filing in the wrong jurisdiction, the United States Supreme Court held that those workers in the "twilight zone," i.e., "that shadowy area within which, at some undefined and undefinable point, state laws can validly provide compensation," may file in either the federal court under the LHWCA or in the state court under the state workers' compensation laws. Id. at 252 and 258, 63 S.Ct. 225, 87 L.Ed. 246.

{¶ 11}Thirty years later, Congress amended the LHWCA to extend its coverage inland. The term "navigable waters of the United States" was broadened to include "any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel." Section 903(a), Title 33, U.S. Code. Employers also agreed to more than double the maximum weekly benefits for permanent total disability in exchange for the elimination of seaworthiness warranty claims. See 9A Larson's Workers' Compensation Law (2007), Section 145.02[8][c].

{¶ 12}In analyzing these 1972 amendments, the Supreme Court reaffirmed that the LHWCA remained concurrent with state workers' compensation law. *Sun Ship, Inc. v. Pennsylvania* (1980), 447 U.S. 715, 719-720, 100 S.Ct. 2432, 65 L.Ed.2d 458. Accordingly, a longshoreman such as Talik, injured while working on land in a location that falls within the expanded 1972 definition of "navigable waters" is inside the "twilight zone" and may apply for benefits under a state workers'

compensation scheme, the LHWCA, or both. However, "any amounts paid to an employee for the same injury, disability, or death for which benefits are claimed under [the LHWCA] pursuant to any other workers' compensation law * * * shall be credited against any liability imposed by this chapter." Section 903(e), Title 33, U.S. Code.

{¶ 13} In this case, although Talik applied for and has already received benefits from Ohio's workers' compensation fund, he now seeks to recover common-law damages against Federal Marine for an intentional tort under Ohio law. A firm understanding of what constitutes an employer intentional tort is necessary to determine whether the LHWCA preempts such a claim.

III. Ohio Claims Against Employers for Intentional Tort

{¶ 14}In *Payne v. Vance* (1921), 103 Ohio St. 59, 133 N.E. 85, this court held that an intentional or willful tort involved the element of intent or purpose. Id. at paragraph one of the syllabus. In so doing, the court distinguished an intentional tort, which requires a specific mental state, from negligence, whether slight, ordinary, or gross. Id. "Wanton

misconduct is such conduct as manifests a disposition to perversity, and it must be under such surrounding circumstances and existing conditions that the party doing the act or failing to act must be conscious, from his knowledge of such surrounding circumstances and existing conditions, that his conduct will in all common probability result in injury." *Universal Concrete Pipe Co. v. Bassett* (1936), 130 Ohio St. 567, 5 O.O. 214, 200 N.E. 843, paragraph two of the syllabus. By contrast, an intentional or willful tort involves an intent to injure. *Reserve Trucking Co. v. Fairchild* (1934), 128 Ohio St. 519, 191 N.E. 745, paragraph one of the syllabus.

{¶ 15} Not until almost 50 years later were claims for intentional torts against employers recognized as an exception to Ohio's workers' compensation exclusivity provision.[3] *Blankenship v.*

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[3] The current version of R.C. 4123.74, which is substantially similar to the version in effect at the time that *Blankenship* was decided, provides: "Employers who comply with section 4123.35 of the Revised Code shall not be liable to respond in damages at common law or by statute for any injury, or occupational disease, or bodily condition, received or contracted by any employee in the course of or arising out of his employment, or for any death resulting from such injury, occupational disease, or bodily condition occurring during the period covered by such premium so paid into the state insurance fund, or during the interval the employer is a self-insuring employer, whether or

Cincinnati Milacron Chemicals, Inc. (1982), 69 Ohio St.2d 608, 5 O.O.3d 504, 433 N.E.2d 572. The *Blankenship* court reasoned that an employee's injury neither arises out of nor is received in the course of employment within the meaning of the Workers' Compensation Act if it is sustained as a result of an employer's intentional conduct.[4] Id. at 613, 23 O.O.3d 504, 433 N.E.2d 572. The definition of "intentional tort" was expanded in *Jones v. VIP Dev. Co.* (1984), 15 Ohio St.3d 90, 15 OBR 246, 472 N.E.2d 1046, to mean "an act committed with the intent to injure another, or committed with the belief that such injury is substantially certain to occur." Id. at paragraph one of the syllabus. An employee was allowed to pursue a common-law claim for an intentional tort against an employer even though the employee had received workers' compensation

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not such injury, occupational disease, bodily condition, or death is compensable under this chapter."

[4] Professor Larson has criticized the *Blankenship*-style exception to workers' compensation exclusivity provision based on the theory that an intentional tort does not arise out of employment as "[t]the most fictitious theory of all *** for if it is a work-connected assault, it is no less so because the assailant happens to be the employer." 6 Larson's Workers' Compensation Law (2007) 103-4, Section 103.01.

benefits for the same injury. Id. at paragraph two of the syllabus.

{¶ 16} The standard of "substantial certainty" in the intentional tort arena caused confusion. See *Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St.3d 100, 109, 522 N.E.2d 489; *Fyffe v. Jeno's, Inc.* (1991), 59 Ohio St.3d 115, 116-117, 570 N.E.2d 1108 (*Jones* "created a confusing status of the law" and engendered "contradicting interpretations" of the intentional-tort standard). A three-part test was established for determining an employer's "intent" in an action by an employee asserting an intentional tort. The employee must demonstrate "(1) knowledge by the employer of the existence of a dangerous process, procedure, instrumentality or condition within its business operation; (2) knowledge by the employer that if the employee is subjected by his employment to such dangerous process, procedure, instrumentality or condition, then harm to the employee will be a substantial certainty; and (3) that the employer, under such circumstances, and with such knowledge, did act to require the employee to continue to perform the dangerous task." *Fyffe*, 59

Ohio St.3d 115, 570 N.E.2d 1108, paragraph one of the syllabus.

{¶ 17} The General Assembly modified the common-law definition of an employer intentional tort by enacting R.C. 2745.01, effective April 7, 2005.[5] The statute provides that in an action for intentional tort, an employee must prove that "the employer committed the tortious act with the intent to injure another or with the belief that the injury was substantially certain to occur." A belief that injury is substantially certain to occur exists when the employer "acts with deliberate intent to cause an employee to suffer an injury, a disease, a condition, or death." R.C. 2745.01(B). The new statute, therefore, rejects the notion that acting with a belief that injury is substantially certain to occur is analogous to wanton misconduct as defined in *Universal Concrete*, 130 Ohio St. 567, 5 0.0. 214, 200 N.E. 843, paragraph two of the syllabus. Because

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[5] An earlier version of R.C. 2745.01, enacted to supersede *Blankenship, Jones, Van Fossen*, and *Fyffe*, see Section 3, Am.H.B. No. 103, 146 Ohio Laws, Part I, 756, 758, was held to be unconstitutional. *Johnson v. BP Chems., Inc.* (1999), 85 Ohio St.3d 298, 707 N.E.2d 1107, syllabus.

the accident in this case predated enactment of R.C. 2745.01, however, the *Fyffe* standard still applies.

{¶ 18} Federal Marine contends that regardless of Ohio's recognition of a claim for employer intentional tort as an exception to Ohio's workers' compensation system, the LHWCA, as a federal law, preempts the state's intentional tort claim.

IV. Preemption

{¶ 19} The federal law issue before this court is whether Ohio's common law tort based on substantial certainty is expressly preempted by the exclusivity provision of the LHWCA, conflicts with the LHWCA scheme of compensation, or stands as an obstacle to the purposes of the LHWCA to provide uniform compensation to longshore workers.

A. Standard

{¶ 20} We most recently considered the issue of federal preemption in a Federal Employers' Liability Act case. *Norfolk S. Ry. Co. v. Bogle*, 115 Ohio St.3d 455, 2007-Ohio-5248, 875 N.E.2d 919. There we acknowledged, "The Supremacy Clause of the United States Constitution provides that 'the

Laws of the United States * * * shall be the supreme Law of the Land; * * * any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.' Clause 2, Article VI, United States Constitution. The clause grants Congress the power to preempt state laws. See *Jenkins v. James B. Day & Co.* (1994), 69 Ohio St.3d 541, 544, 634 N.E.2d 998, citing *In re Miamisburg Train Derailment Litigation* (1994), 68 Ohio St.3d 255, 259, 626 N.E.2d 85.

{¶ 21} Preemption can occur in any one of three ways: by express preemption, by preemption of the field, and by preemption due to conflict. Id. at 77. Express preemption occurs when Congress declares outright that an enactment preempts state law. *Shaw v. Delta Air Lines, Inc.* (1983), 463 U.S. 85, 95-98, 103 S.Ct. 2890, 77 L.Ed.2d 490. When Congress has made its intent known through explicit statutory language, the court's task is an easy one, for preemption fundamentally is a question of congressional intent. *English v. Gen. Elec. Co.* (1990), 496 U.S. 72, 78-79, 110 S.Ct. 2270, 110 L.Ed.2d 65.

{¶ 22} In the absence of explicit statutory language, Congress preempts the field to the

exclusion of state law when it enacts a " 'scheme of federal regulation * * * so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,' or where an Act of Congress 'touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.' " (Ellipsis and brackets sic.) *English*, 496 U.S. at 79, 110 S.Ct. 2270, 110 L.Ed.2d 65, quoting *Rice v. Santa Fe Elevator Corp.* (1947), 331 U.S. 218, 230, 67 S.Ct. 1146, 91 L.Ed. 1447. The United States Supreme Court has emphasized that " '[wlhere * * * the field which Congress is said to have preempted' includes areas that have 'been traditionally occupied by the States,' congressional intent to supersede state laws must be ' "clear and manifest." ' " (Ellipsis sic.) *English*, 496 U.S. at 79, 110 S.Ct. 2270, 110 L.Ed.2d 65, quoting *Jones v. Rath Packing Co.* (1977), 430 U.S. 519, 525, 97 S.Ct. 1305, 51 L.Ed.2d 604, quoting *Rice*, 331 U.S. at 230, 67 S.Ct. 1146, 91 L.Ed. 1447.

{¶ 23} Finally, preemption of state law occurs when the state law actually conflicts with federal law. Preemption due to conflict exists when

compliance with both state and federal requirements is impossible, see, e.g., *Florida Lime & Avocado Growers, Inc. v. Paul* (1963), 373 U.S. 132, 142-143, 83 S.Ct. 1210, 10 L.Ed.2d 248, or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz* (1941), 312 U.S. 52, 67, 61 S.Ct. 399, 85 L.Ed. 581. See *English*, 496 U.S. at 79, 110 S.Ct. 2270, 110 L.Ed.2d 65. The United States Supreme Court has expressed a reluctance to infer preemption in ambiguous cases "in light of the presumption against the pre-emption of state police power regulations." *Cipollone v. Liggett Group, Inc.* (1992), 505 U.S. 504, 518, 112 S.Ct. 2608, 120 L.Ed.2d 407.

{¶ 24} Federal Marine argues that Talik's claim is expressly preempted or, in the alternative, is preempted as impeding Congress's goals within the LHWCA. We will now examine whether either of those two methods of preemption applies.

B. Express Preemption

{¶ 25} Federal Marine contends that the LHWCA expressly preempts Talik's common-law claim. "If the statute contains an express pre-

emption clause, the task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent." *CSX Transp., Inc. v. Eastenvood* (1993), 507 U.S. 658, 664, 113 S.Ct. 1732, 123 L.Ed.2d 387.

{¶ 26} The exclusivity clause within the LHWCA that Federal Marine relies upon, Section 905(a), Title 33, U.S. Code, provides: "The liability of an employer prescribed in [Section 904, Title 33, U.S. Code] shall be exclusive and in place of all other liability of such employer to the employee * * * entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee * * * may elect to claim compensation under the chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death."

{¶ 27} In other words, for "such injury" suffered by longshoremen, employer liability is limited to the damages recoverable under the LHWCA. Talik argues that because the LHWCA

fails to include an injury caused by employer intentional conduct within the ambit of "such injury" in Section 905(a), there can be no finding of express preemption.

{¶ 28} The LHWCA defines "injury" in Section 902(2), Title 33, U.S. Code as "accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment." Although the federal statute covers an intentional tort by third parties against an employee, the definition does not include an intentional tort by an employer.

{¶ 29} Thus, courts have held that because Congress did not explicitly include an employer intentional tort in the exclusive-remedy provision of Section 905(a), an employee may pursue an intentional tort action against the employer. See *Taylor v. Transocean Terminal Operators, Inc.* (La.App.2001), 785 So.2d 860; *Austin v. Johns-Manville Sales Co.* (D.Me. 1981), 508 F.Supp. 313,

316. We therefore cannot say that Congress has expressly preempted the intentional tort standard that Ohio uses.

C. Conflict Preemption

{¶ 30} The Eighth Appellate District determined that because a claim for intentional tort is not specifically mentioned as a possible claim within the LHWCA, the claim is not preempted by the LHWCA; however, the court's approach is incomplete. Although Talik's claim for a substantial-certainty intentional tort is not expressly preempted by the LHWCA, it may still be preempted if it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. State legislation is declared to be invalid only when it "works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations." *S. Pacific Co. v. Jensen* (1917), 244 U.S. 205, 216, 37 S.Ct. 524,61 L.Ed. 1086.

{¶31} Talik urges that we should look only to Ohio law to determine whether a substantial-certainty tort is excluded from the scope of the

LHWCA. However, in determining the scope of the federal statute, we must apply federal law. See *Gravatt v. New York City* (C.A.2, 2000), 226 F.3d 108, 118 ("the 905(b) action [under the LHWCA] was to be developed as a matter of uniform federal maritime law, not by incorporating the tort law of the particular state in which the action arose").

{¶ 32} Ohio is one of only eight states[6] that have judicially adopted a "substantial certainty" standard for employer intentional torts. 6 Larson's Workers' Compensation Law, supra, at 103-10, Section 103.04[1]. Most courts that have found an intentional tort exception to the LHWCA's exclusivity provision, however, limit that exception to "specific intent" employer intentional torts. See *Houston v. Bechtel Assoc. Professional Corp.*, (D.D.C. 1981), 522 F.Supp. 1094, 1096 ("Nothing short of a specific intent to injure the employee falls outside the scope of § 905(a). Absent such specific intent, the employee is foreclosed from maintaining a tort action against his employer"); *Roy v. Bethlehem Steel Corp.*

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[6] The other states are Connecticut, Florida, Louisiana, New Jersey, North Carolina, South Dakota, and Texas. 6 Larson's Workers' Compensation Law, supra, at 103-10, Section 103.04[1], fn.1.

(E.D. Tex.1993), 838 F.Supp. 312, 316 (evidence that the conditions of the shipyards were so dangerous that the employer must have been "substantially certain" that injuries or fatalities would occur was not sufficient to establish a specific intent by the employer to injure the employee); *Austin*, 508 F.Supp. at 316, quoting 2A Larson, Workmen's Compensation Law (1976) 13-5, Section 68.13 ("the overwhelming weight of authority is that 'the common-law liability of the employer cannot be stretched to include accidental injuries caused by the gross, wanton, wilful, deliberate, intentional, reckless, culpable, or malicious negligence, breach of statute, or other misconduct of the employer short of genuine intentional injury' "). Thus it appears that an "accidental injury," as defined by Section 902(2), Title 33, U.S. Code and covered by the LWHCA, includes an injury sustained as a result of the employer's negligence, gross negligence, recklessness, or wanton conduct. Only a specific, deliberate intent by the employer to injure an employee falls outside the provisions of the LWHCA.

{¶ 33} The United States Supreme Court has warned that the LHWCA is "not a simple remedial

statute intended for the benefit of the workers. Rather, it was designed to strike a balance between the concerns of the longshoremen and harbor workers on the one hand, and their employers on the other. Employers relinquished their defenses to tort actions in exchange for limited and predictable liability. Employees accept the limited recovery because they receive prompt relief without the expense, uncertainty, and delay that tort actions entail." *Morrison-Knudsen*, 461 U.S. at 635-636, 103 S.Ct. 2045, 76 L.Ed.2d 194.

{¶ 34} Compensation benefits secured by the employer constitute the exclusive employee remedy "in place of all other liability" of the employer "at law or in admiralty." Section 905(a), Title 33, U.S. Code. The legislative history of the 1972 amendments also reveals that "Congress intended that compensation, not tort damages, [was] to be the primary source of relief for workplace injuries for longshoremen against their employers." *Peter v. Hess Oil Virgin Islands Corp.* (C.A.3, 1990), 903 F.2d 935, 952. We would upset the balance achieved by the LHWCA if we stretched the language of the federal statute to

permit an exception from its exclusive coverage for "substantial certainty" intentional torts.

{¶ 35} Furthermore, applying Ohio's standard for employer intentional torts would be inconsistent with the central purpose underlying the LHWCA to create " 'a uniform compensation system.' " *Dir. Office of Workers' Comp. Programs, U.S. Dept. of Labor v. Perini N. River Assoc.* (1983), 459 U.S. 297, 318, 103 S.Ct. 634, 74 L.Ed.2d 465, fn. 26, quoting 1972 Senate Report No. 92-1125 at 13. See also *Hill v. Knapp* (2007), 396 Md. 700, 716-717, 914 A.2d 1193. We would create an inequitable situation if we permitted land-based maritime workers to maintain claims for "substantial certainty" intentional torts while the same maritime workers injured in another jurisdiction or upon the navigable waters would be limited to "specific intent" claims for intentional tort.

{¶ 36} Therefore, we hold that the Longshore and Harbor Workers' Compensation Act, Section 901 et seq., Title 33, U.S. Code, preempts a claim under Ohio law alleging that the claimant's employer caused an injury through an intentional act committed with the belief that injury was "substantially certain" to occur.

V. Conclusion

{¶ 37} Because a claim for "substantial certainty" intentional tort acts as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress in enacting the LHWCA, such a claim is preempted by Section 905(a), Title 33, U.S. Code. The judgment of the Cuyahoga County Court of Appeals is reversed, and the cause is remanded for consideration of Talik's second assignment of error.

Judgment reversed
and cause remanded.

MOYER, C.J., and LUNDBERG, STRATTON, O'DONNELL, and CUPP, JJ., concur.

PFEIFER and VUKOVICH, JJ.,. concur in part and dissent in part.

JOSEPH J. VUKOVICH, J., of the Seventh Appellate District, sitting for O'CONNOR, J.

PFEIFER, J., CONCURRING IN PART AND DISSETING IN PART.

{¶ 38} The issue in this case is whether the Longshore and Harbor Workers' Compensation Act ("LHWCA"), Section 901 et seq., Title 33, U.S. Code,

preempts a claim for intentional tort against an employer under Ohio law. The majority opinion concludes that intentional-tort claims may be brought against an employer because the LHWCA does not preempt all intentional torts. I concur with this conclusion.

{¶ 39} The majority opinion further concludes that because Ohio applies a "substantial certainty" standard to intentional torts against an employer, and not one of specific, deliberate intent, injured longshoremen may not pursue an intentional-tort claim in Ohio against their employers. The majority reaches this conclusion because applying a different standard in Ohio than in other states "would be inconsistent with the central purpose underlying the LHWCA to create "a uniform compensation system." Majority opinion at ¶ 35, quoting *Dir., Office of Workers' Comp. Programs, U.S. Dept. of Labor v. Perini N. River Assoc.* (1983), 459 U.S. 297, 318, 103 S.Ct. 634, 74 L.Ed.2d 465, fn. 26, quoting 1972 Senate Report No. 92-1125 at 13. But this central purpose is already undermined by the federal law itself, because as the majority opinion states, certain injured workers "may apply for benefits under a state

workers' compensation scheme, the LHWCA, or both." Majority opinion at ¶ 12.

{¶ 40} Each of the 50 states has enacted its own unique state workers' compensation system, any one of which can be used to determine liability for an injury pursuant to the LHWCA. Accordingly, it will not offend the LHWCA if a substantial-certainty intentional tort standard, which according to the majority opinion, at ¶ 32, has been adopted by at least seven other states, is used in Ohio to determine whether an employer committed an intentional tort. I would hold that the LHWCA does not preempt a claim for an employer intentional tort in Ohio.

VUKOVICH, J., concurs in the foregoing opinion.

McDonald Hopkins, L.L.C., Jerome W. Cook, Glenn D. Southworth, Matthew M. Nee, and Elizabeth A. Wambsgans, for appellee.

Tucker, Ellis & West, L.L.P., Irene C. Keyse-Walker, and Jeffrey A. Healy, for appellant.

Court Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 87073

JOSEPH TALIK

PLAINTIFF-APPELLANT

vs.

FEDERAL MARINE TERMINALS, INC.

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV 546597

BEFORE: McMonagle, J., Cooney, P.J., and Rocco, J.

RELEASED: May 1, 2008
JOURNALIZED: May 23, 2008

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

CHRISTINE T. McMONAGLE, J.:

Plaintiff-appellant, Joseph Talik, in two assignments of error, sought review of the trial court's judgment granting summary judgment in favor of defendant-appellee, Federal Marine Terminals, Inc. *Talik v. Federal Marine Terminals, Inc.*, 172 Ohio App.3d 704, 2006-Ohio-3979, 876 N.E.2d 1246. This court reversed the trial court's judgment upon the first assignment of error,[1] and Federal Marine successfully appealed to the Ohio Supreme Court. *Talik v. Federal Marine Terminals, Inc.*, 2008-Ohio-937, slip opinion. On remand from the Ohio Supreme Court, we consider Talik's second assignment of error.

In his second assignment of error, Talik argues that even if the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA") preempts his intentional tort claim (as has now been determined by the Supreme Court), the trial court still erred in granting Federal Marine's motion for summary

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[1] The majority declined to address the second assignment of error, as it was moot in light of the ruling on the first assignment of error.

judgment because the exclusivity provisions of the LHWCA are in the nature of an affirmative defense, and were waived by Federal Marine because they were never raised as such. We disagree.

Federal Marine raised subject matter jurisdiction as an affirmative defense in its answer. Because Ohio is a notice-pleading state, Cincinnati v. Beretta U.S.A. Corp., 95 Ohio St.3d 416, 2002-Ohio-2480, 768 N.E.2d 1136, ¶ 29, assertion of that affirmative defense was sufficient. Accordingly, Talik's second assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

/s/ Christine T. McMonagle
CHRISTINE T. McMONAGLE, JUDGE

COLLEEN CONWAY COONEY, P.J., and
KENNETH A. ROCCO, J., CONCUR

State of Ohio,)
) SS:
County of Cuyahoga.)

IN THE COURT OF COMMON PLEAS

JOSEPH TALIK,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 546597
	)	Judge Ronald Suster
FEDERAL MARINE TERMINALS, INC.,	)	
	)	
	)	
Defendant	)	

Deposition of Joseph Talik, the plaintiff herein, called on behalf of the defendant for oral examination, pursuant to the Ohio Rules of Civil Procedure, taken before Judi Sadler, Registered Professional Report and Notary Public in and for the State of Ohio pursuant to notice at the Sotera residence, 32825 Nimrod West, Solon, Ohio, on Friday, April 29, 2005, commencing at 1:30 p.m.

create an unstable and dangerous condition, correct?

A Yes.

Q I take it you know the names of the blockers at the terminal?

A No, I don't, because they work on the ships and I'm not too familiar with most of the guys that work on the ships.

Q So if I asked you which longshoreman blocked that pile of pipe, could you give me a list of people who it may be?

A No, I wouldn't know at all.

Q Okay. But there are workers of your union and your local who are designated as blockers, correct?

A Some are. At that particular time they may have hired what we call checkoff men. They're not in the union. The union men get hired first and the checkoff men, depending on how many they need, would get hired next. So I really don't know who the blockers were.

Q You're not aware of any member of FMT management that instructed anyone to block that pile in any particular way, are you?

A The only guy – the only person that would in charge would be Mark Chrzanowski. Now, whether he relayed his instructions to the layout men who, in

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turn, instructs the blockers on how to do it, I don't know.

Q So let me see if I can just narrow that down a little bit.

You personally, Joe Talik, are not aware of any member of the FMT management that told anyone that they should block that pile in a certain way, are you?

A No.

MR. HEALEY: You know, I'm going to go off the record here for a second.

(Discussion off the record.)

Q Joe, on September 10th, do you remember what type of footwear you were wearing?

A Steel-toed tennis shoes.

Q Steel-toed tennis shoes?

A Yes. Exactly what I'm wearing right now.

Q Let me take a look.

A Yes. Exactly what I'm wearing right now.

Q Let me take a look.

A They have steel toes.

Q Is that something that you wore at the dock regularly?

A Yes.

Q Do you consider that appropriate clothing for longshore work?

A For my type of work being a checker.

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on it.

Q And what is this 1 over here in the left-hand side?

A We were expecting one truck.

Q So one truck from Thomas Erie that was getting how many coils?

A It would depend on the weight of the coils. Generally, it ran from 10 to 12.

Q These coils came from the Federal Rhine ship?

A Yes.

Q Okay. Then next on the list is a 3. That means three trucks are coming; is that right?

A Yes.

Q From Specialty Pipe Company?

A Well, the trucks weren't from Specialty Pipe. They were trucks that usually turned in a low bid to haul that material. It could be anybody.

Q Okay. But the customer is Specialty Pipe; is that right?

A Yes.

Q And the pipes came off the Federal Saint Laurent. What does this mean over here, the 1-2?

A Well, the first – the No. 1 would be one truck from -- they didn't know who it was coming in for. The other two trucks was from Dingess Trucking.

Q Dingess Trucking?

Q Do those come off the Federal Saint Laurent, too?

A Yes.

Q Were they smaller diameter bundled pipe?

A Yes.

Q Was the Dingess truck that wanted 65,000 pounds waiting for you at 7 or did he come sometime after 7?

A It was more like a quarter to 8.

Q So the 45 minutes between the start of the workday at 7 and about a quarter to 8 when the first Dingess truck arrived, you just – you got this list and then you just waited for the truck; is that right?

A I got the list from the truck driver. He stopped at the receiving office and then came across and found me.

Q And gave you this work list?

A Yes.

Q So what did you do for that 45 minutes while you were waiting?

A I discussed with Bob what we might have going out and we waited for the fuel truck.

Q Okay. How long is your workday, in general?

A Eight hours.

Q Eight hours. And it looks like on this day there are 1, 4, 5, 9, 12, 13 trucks coming in. Is that

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Q Let me stop you so I understand what you're talking about. You're saying that the width of the trailer is – the usable width of the trailer is approximately --

A Is 88 to 90 inches.

Q Is 88 to 90 inches. So are you trying to find one layer of pipe that when put side to side, the pipe is approximately 88 to 90 inches.

A Correct, as long it's the same diameter.

Q So when you first go into the pit on that day, you're looking to find pipe of a diameter that when placed side to side will equal 88 to 90 inches.

A Yes.

Q Are they only going to have one layer of pipe on the truck?

A No. It would have taken two layers.

Q To get 65,000 pounds; is that right?

A Yes.

Q So when you first go down – so when you talk about measuring, what you're measuring is the diameter of the pipe, correct?

A The outside diameter, yes.

Q And the only way to measure the outside diameter of the pipe is to measure on one of the ends, correct?

A Correct.

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Q And on September 10th when you first went down to the pit, what diameter pipe were you looking for?

A I was hoping to find 22 inch. Four of those would be 88 inches, but it didn't work out that way. I may have found a couple of 22's, maybe a 24. Then it became harder to find the pipe I needed.

Q Okay. How many pipes did Bob take out in the forklift at a time?

A I'm trying to recall. I think he had three pieces already on the truck.

Q Well, is each – does he take one piece at a time?

A No, he took all three at one time.

Q Okay. So when you walked down into the pit that first time before Bob took any pipes out, there were chalks on the bottom level, correct.

A There were a couple.

Q Okay. When you say a couple, was there one on each end of the bottom pipe?

A Yes.

Q And who took those chalks out?

A Nobody. Bob just went in there and picked them up.

Q Picked what up?

A Picked the pipe up.

Q So he went and picked up the first pipe?

A Yes, the first three pieces.

middle of the pipes so they're balanced on the forks?

A Yes.

Q Where are you standing when he's doing that?

A Off to the side.

Q Why?

A Because that's the safest place to be.

Q Okay. Does it take him just one pass to get the forks in there or does he have to back up and do it again?

A Sometimes he has to back and do it again.

Q Do you remember on this particular time, on this particular day for this first time that he was going in there, did he get through on the first or did he have to back up and ram it in there again?

A No, I don't recall.

Q But in any event, it's not the kind of thing where he sort of slides it in, he actually has to use the power of the forklift to move the pipes a little bit to jar them to get them onto the forks; is that a fair assessment?

A Yes.

Q The pipes are not in any way up off the ground? They're actually sitting right on the concrete; is that right?

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Q Did you in any way climb onto the pipe?

A No.

Q Explain to me how it is that if you're measuring the outside diameter of the pipe on the end, how it is that your leg got to be in front of the pipe?

A Some of that pipe was 30-feet long, some was shorter. The piece I was measuring was a shorter piece so when it collapsed, it caught my right leg and there was some abrasions on my left leg.

Q How did your leg, whether right or left, get in front of the pipe if you're measuring the end?

A I was on the side of it, but the pipe that broke loose was longer than the pipe I was measuring.

Q Were you standing straight up?

A No, I was bent down.

Q The pipe you were measuring, was it on the first tier or the second tier?

A Second tier.

Q Is that pipe the one that pushed down that forced out the pipe that hit you?

A It must have.

Q Can you tell from this picture if this pipe here

in the middle of these three pipes was the one that you were measuring?

MR. COOK: Objection. Calls for

Q Certainly Mark is a lot younger than you are, right?

A Mark is the warehouse supervisor. He's familiar with the cargo.

Q How many times did you complain to Mark about this pile?

A I – I don't have an exact number. It had to be a couple, three times. Plus he had knowledge of it. He knew how we loaded it and it was just put on standby.

MR. HEALEY: I'm going to take one more break here, if you don't mind. Why don't you take a break, too.

MR. HEALEY: Let's go back on the record.

Q Joe, before we stopped, we were talking about the complaints you say you made to Mark. Let me rewind for one second and ask you, at the time that the pipe crushed your leg, was

anybody else from FMT management in the area?

A No.

Q Did anybody from FMT management instruct you specifically to go measure the diameter of the pipe in the way you did?

A Again, it was part of my work duty. When I get my

The pipes and made them unstable?

A No.

Q Do you recall talking to a claims person in your hospital room the day after the injury?

A Claims?

Q Yeah. Someone named Valerie from a company called Frank Gates, a claim --

A No. There was somebody else and I was told about it later, but I was out of it.

MR. SOUTHWORTH: I would like the record to reflect that Frank Gates represented that they were only going to be talking to Mr. Talik about his injuries and the treatment of his injuries and were not going to be speaking

to him about the facts of the accident.

Q There's been some statements in these affidavits about some boosting of production levels in the summer of 2004. Do you know what they're talking about?

A Again, it relates to sorting and loading at the same time. Rather than hire extra manpower, they would have a loading gang, which was a checker and a driver, maybe go through a pile of wire to dig out just what they needed for that day to load a truck.

Q Is that what boosting up production levels means?

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A Economically it benefited them.

Q Where did that come from? Where did that information come from that that's what you were supposed to do?

A From the warehouse supervisor.

Q Mark?

A Mark. If you look at my work list I had wire trucks on there that if I would have – wouldn't have had the incident, I would have had to dig

out wire to load them.

Q What would have happened if you said I'm not going to do it this way. I'm not going to do this?

A That's not my attitude. Back when Cleveland Stevedore was in business, the reason you came into the warehouse was because they knew you were capable of doing a good job, and I never varied from that. Whatever they told me to do, I would do. That's just the type of person I am. So I wasn't going to refuse to do a job because I had to dig it out.

Q But I assume that if you thought something was going to put you in harm's way, you wouldn't do it?

A It was on my work list. They were aware of the danger.

Q That's not my question.

A Well - -

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

JOSEPH TALIK,

Plaintiff,

JUDGE RONALD SUSTER

-vs-

CASE NO. CV-04-546597

FEDERAL MARINE TERMINALS, INC., et al.,

Defendants.

Deposition of MARK A. CHRZANOWSKI, taken as if upon cross-examination before Dawn M. Fade, a Registered Merit Reporter and Notary Public within and for the State of Ohio, at the offices of McDonald Hopkins Co., L.P.A., 2100 Fifth Third Center, Cleveland, Ohio, at 10:00 a.m. on Tuesday, March 22, 2005, pursuant to notice and/or stipulations of counsel, on behalf of the Plaintiff in this cause.

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change of your job descriptions with Federal Marine Terminals, if any, from approximately January of 1998 to the present?

A: The change from?

Q: Well, if there has been any. I don't want to suggest there has been any, but can you describe your employment with Federal Marine Terminals since the time they took over operations to the present?

A: I've been the warehouse manager from January 1 till the present.

Q: Warehouse manager is a different job role, however, than you had with Cleveland Stevedore, is that correct?

A: That's correct, yes.

Q: And can you tell me what your job responsibilities generally are as warehouse manager?

A: To oversee the daily loading of the trucks and pretty much day-to-day functions down at the terminal.

Q: Would you consider yourself Joe Talik's immediate supervisor?

A: Yes.

Q: When Federal Marine Terminals installed you in

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Holchin?

A: Not when Mike Smith was there.

Q: Who had direct supervisory control over those workers?

A: Mike Smith.

Q: While in the employ of Cleveland Stevedore, did you have any training regarding the safe handling and storage of thin and thick-walled pipe?

A: Not that I recall, no.

Q: Have you ever heard of the term blooms?

A: Yes.

Q: What are blooms?

A: Thick, round steel, almost like pipe but they're solid.

Q: Were you aware of any injuries to workers during your employment with Cleveland Stevedore that had resulted from improper stacking or handling of blooms?

MR. VOUDOURIS: Objection. You can answer.

A: Yes.

Q: And can you describe that for me and if you recall mane the persons or person injured.

A: I didn't see it happen, but it was Al Miner.

Q: And what do you recall, if anything about that

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incident?

A: Nothing. I did not see it.

Q: Other than not seeing it, was any information relayed to you about what happened?

A: Yes. All I heard was that Al was by the pipe, he was working with his brother and the pipe rolled up or the blooms, rather, rolled up onto his ankle.

Q: While working at Cleveland Stevedore, did Cleveland Stevedore have occasion to unload thick and thin-walled pipe and store it in the yard?

A: Yes.

Q: And were you ever aware of any safety policies or procedures for protecting dockworkers from whatever risks may be inherent in that type of handling?

A: Can you repeat that? I –

MR. COOK: Could you please repeat that question, please?

- - - -

(Thereupon, the requested portion of the record was read by the Notary)

- - - -

A: No.

Q: As you sit here today, are you aware of any risks

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associated with the handling of thick and thin-walled pipe that are stacked in piles?

A: Yes.

Q: And what are those?

A: That they could, they could roll, they could kick out and roll.

Q: Do you know what causes them to kick out or roll?

A: I mean, obviously being bumped or being, you know – there's a lot of weight involved, you know, with the way they're stacked. Being bumped is the biggest one.

Q: Would a man bumping a stack of pipe similar to what injured Joe Talik cause those pipes to move?

A: Bumping with?

Q: His body.

A: No.

Q: Perhaps if bumped by a tow motor they may move?

A: Yes.

Q: During your employment with Federal Marine Terminals, are you aware of any safety procedures or policies for protecting dockworkers in the handling of thick and thin-walled pipe stacks?

A: I mean, just thin-wall pipe? I mean, we have safety manuals and that type of materials, we

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Q: But you don't recall, at least as you sit here, any particular training regarding the stacking of thin and thick-walled pipe and those risks and what should be done to minimize those risks?

A: No.

Q: But there's no question, Mr. Chrzanowski, that during your entire tenure with Federal Marine Terminals you were aware of the risks inherent in stacks of thin and thick-walled pipe?

A: Yes.

Q: Is that right?

A: Yes.

Q: Okay. Did you ever make any recommendations to Federal Marine Terminals regarding improved safety procedures for the handling or the safe handling of thin and thick-walled pipe stacks?

A: Yes.

Q: Approximately when was your first recommendation?

A: I don't know.

Q: Was it before Joe Talik's accident?

A: Yes.

Q: And just for purposes of reference, do you recall that Joe Talik's accident was on or about September 10 of 2004?

A: Yes.

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A. Well, there was plenty of room to stack that in the area, there is plenty of room to stack that one high.

Q. So there was no shortage of space to stack it one high, correct?

A. In that area.

Q. And what particular area are you talking about?

A. The warehouse 26.

Q. Okay. So there was plenty of room to stack the pipe one high in dock 26, is that what you're saying? I just want to understand what you're saying.

A. Yeah, that's what I'm saying.

Q. Okay. So at least from your point of view, forget about there being any particular procedure or policy, from your own personal point of view there was really no reason to stack the pipe in dock 26 more than one high?

A. Yes.

Q. Are you absolutely certain that dock 26 is the dock that has the slope descending all the way to the dock wall?

A. I mean, I know they both have slopes going in. I've never measured or --

Q. I'm not trying to trick you or anything, I'm just

Q. Do you agree that loading a truck from a pipe stack like this that is more than one high and attempting to sort it at the same time is a particularly dangerous operation?

A. Yes.

Q. Did Federal Marine Terminals, in the summer of 2004, require the simultaneous loading and sorting of pipe to boost production levels?

A. No.

Q. I see in reading Joe Talik's job description as a terminal checker that he's accountable directly to the Federal Marine manager, which would be you, correct?

A. Yes.

Q. There's a set of job descriptions for a variety of these individuals including checker, there's also a job description for a blocker/dunnage man, can you tell me what the blocker/dunnage man position is?

A. The blocker blocks the cargo when it comes off the vessel, whether it be coils, wire, pip.

Q. Would you include blocking it in dock 26 and dock 24?

A. Off the vessel, yes.

Q. So once the material, say this particular pipe is

pile of pipe to get information off the pipe, you would approach it from the side?

A. Yes.

Q. Do you happen to know how Joe Talik approached this pile on the day of his accident?

A. No. I wasn't there.

Q. Have you ever witnessed a stack of pipe spontaneously collapsing?

A. Yes.

Q. Okay. Did you see that during the day or was that something that you realized had occurred overnight?

A. Oh. It would never just fall on its own. Are you talking about -- I've watched the tow motor driver go in to get the pipe out and watched the pipe come down. I never witnessed or come in the following day and seen that it had fell on its own, no.

Q. Okay. Well, are you aware that by removing some pipe from the pile with a tow motor that that may change the geometry and forces in the pile and it may collapse by itself?

A. No.

Q. So it is your view that once the tow motor operator has secured some pipe on its lift, on

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

JOSEPH TALIK,	)	
	)	CASE NO. 546597
	)	
Plaintiff,	)	JUDGE RONALD SUSTER
	)	
v.	)	
	)	**AFFIDAVIT OF ROBERT HOLCHIN**
FEDERAL MARINE TERMINALS, INC.	)	
	)	
	)	
Defendants.	)	

STATE OF OHIO)
)
COUNTY OF CUYAHOGA)

I, Robert Holchin, being of sound mind and first duly sworn to testify truthfully, depose and say as follows:

1. I am an adult person and competent to make this Affidavit. The facts set forth herein are based upon my own personal knowledge.

2. I am a longshoreman for Federal Marine Terminals, Inc. ("FMT").

3. I am a member of Local 1317.

4. I have worked with Joe Talik for approximately forty-three (43) years and, prior to his accident, he was my checker.

5. I am a forklift operator, and have been so for approximately forty (40) years.

6. The accident involved thin and thick-walled steel pipe in varying lengths and diameter.

7. Attached as Exhibit 1 are a number of photographs of the accident scene, which show the pile of steel pipe (taken after Joe's accident).

8. During the course of my career, I have handled thin and thick-walled steel pipe on many occasions.

9. FMT chose to store the pipe in piles.

10. This method of storing the pipe is dangerous, since piles have been known to spontaneously collapse.

11. At the time of Joe's accident, it was common knowledge among the longshoremen and FMT management that the piles of pipe would spontaneously collapse.

12. At the time of Joe's accident, it was common knowledge among the longshoremen and

FMT management that this method of storing the pipe was dangerous.

13. I have complained to FMT management about how dangerous this method of storing the pipe was to the longshoremen, but FMT management never responded to my complaints or took corrective action. Other longshoremen have also complained about this method of storing the pipe.

14. The pile that was involved in Joe's accident was a fresh pile, and had been delivered by a ship two to three weeks before Joe's accident.

15. In the two to three weeks prior to Joe's accident, I complained to Mark Chrzanowski (FMT Management) that the pile had to be broken down and sorted prior to the arrival of a customer's truck for delivery.

16. Joe also complained to Chrzanowski that the pile had to be broken down and sorted prior to the arrival of a customer's truck, but Chrzanowski would not give us the time to break down and sort the pile.

17. Chrzanowski is aware that piles of thin and thick-walled steel pipe are dangerous because he was an employee of Cleveland Stevedore when a similar accident occurred involving Al Minor.

18. Al Minor was injured in the same way Joe Talik was injured when a pile of steel released and rolled onto Al, causing a severe ankle injury.

19. Al and Joe's accidents occurred because FMT Management did not plan for the breaking down and sorting of the pile of steel prior to the arrival of customers' trucks.

20. The company says "Safety is number one," but I walked out of a safety meeting in protest when FMT management would not respond to our complaints about unsafe conditions on the dock.

21. I have said "They [FMT] talk safety as long as it don't cost them a dime."

22. Complaints by longshoremen of unsafe conditions are not acted upon by FMT.

23. After Joe's accident, I yelled at Mark Chrzanowski and Joe Thornton (both FMT Management) regarding the accident. I confronted them about how dangerous the piles of steel pipe are if not broken down and sorted, and about FMT's failure to respond to the longshoremen's prior complaints. I told them we were not given time to properly break down and sort the pile. Neither Chrzanowski nor Thornton denied my statements or tried to defend the company's actions.

FURTHER AFFIANT SAYETH NAUGHT.

3/31/05 /s/ Robert D. Holchin

Date Robert Holchin

SWORN TO BEFORE ME and subscribed in my presence this 31st day of March, 2005.

/s/Dolores Kreeger
Notary Public

100

(1)

No. 08-4

FILED
JUL 22 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the Supreme Court of the United States

JOSEPH TALIK,

Petitioner,

v.

FEDERAL MARINE TERMINALS, INC.,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Ohio

BRIEF IN OPPOSITION

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July 22, 2008

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QUESTION PRESENTED FOR REVIEW

Did the Ohio Supreme Court properly conclude that allowing a longshore worker to assert Ohio's "substantial certainty" intentional tort against his maritime employer would constitute an obstacle to the accomplishment and execution of the full purposes and objectives of Congress in enacting the Longshore and Harbor Workers' Compensation Act, Section 901 *et seq.*, Title 33, U.S. Code?

CORPORATE DISCLOSURE STATEMENT

The parent company of Federal Marine Terminals, Inc. is Fednav Holdings (USA), Inc. No publicly held company owns 10% or more of Federal Marine Terminals, Inc.'s stock.

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INTRODUCTION

Petitioner Joseph Talik asks this Court to grant certiorari for the purpose of rewriting the LHWCA[1] to incorporate an aberrational common law tort action previously recognized by Ohio courts. For Petitioner to prevail, the LHWCA would have to accommodate: 1) the Ohio tort theory that "employer intentional torts ... necessarily arise outside the course of employment"[2] – a theory that the leading treatise on workers' compensation law describes as "[t]he most fictitious of all" justifications offered to evade exclusive liability provisions in workers' compensation statutes[3]; 2) a "substantial certainty" standard for intentional torts that has been rejected by the vast majority of states and was eliminated by Ohio's General Assembly in 1995; and 3) holdings of Ohio courts "that employees may recover workers' compensation benefits *and* damages for employer intentional torts"[4] – a theory of double recovery that has been recognized by *no* other state and that is antithetical to the purposes of the LHWCA.

The Ohio Supreme Court properly rejected Petitioner's attempts to contort Congress' careful balance of rights and liabilities in the LHWCA, and

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[1] Longshore and Harbor Workers' Compensation Act, Section 901 *et seq.*, Title 33, U.S. Code ("LHWCA" or "the Act").

[2] Petition for Writ of Certiorari ("Pet."), p. 1.

[3] 6 Larson's Workers' Compensation Law § 103.01, 103-5 (2007).

[4] Pet., p. 2 (emphasis added).

correctly concluded that longshore workers could not expose their maritime employers to liabilities far beyond the "no-fault" compensation benefits required by the LHWCA. The Court thoroughly analyzed state and federal courts' concurrent jurisdiction over workers' compensation claims filed by longshore employees injured in the "twilight zone" between land and sea, and correctly held that concurrent jurisdiction over no-fault *benefits* did not equate to concurrent jurisdiction over fault-based *torts*. To the contrary, Congress' intent to: 1) make compensation – not tort damages – the primary source of relief for longshore workers injured in the workplace; and 2) create a uniform compensation system for longshore workers, preempts application of the Ohio tort.

Nor does the Ohio Supreme Court decision embody any "recurring" issue (Pet., p. 1) for this Court's review. Ohio's General Assembly adopted a "deliberate intent" standard for an intentional employer tort in 2005, bringing Ohio in line with the vast majority of states and the federal common law (to the extent federal law would recognize *any* tort-based exception to workers' compensation exclusivity). The Ohio Supreme Court's ruling precluding Petitioner's attempt to take advantage of the 2004 common law tort presents no cert-worthy question for this Court.

STATEMENT OF THE CASE

A. Relevant Facts.

Respondent Federal Marine Terminals, Inc. ("Federal Marine") employs longshore workers to conduct cargo handling operations along the Great

Lakes and other U.S. shipping waterways. At all relevant times, Federal Marine has been in full compliance with its employee compensation benefit obligations under the LHWCA.

Petitioner Joseph Talik was a "checker" for Federal Marine. He and forklift operator Robert Holchin were responsible for ensuring that cargo loaded onto delivery trucks at the Cleveland, Ohio dock matched a customer's order.

On September 10, 2004, Petitioner and Holchin were assigned to fill an order for pipe from a pile of thin- and thick-walled pipe of varying diameters that had been previously unloaded from a vessel on Dock 26. After Petitioner selected three pipes from the edge of the pile, Holchin hoisted the pipes onto his forklift and drove them to the waiting truck. Before selecting additional pipes, Petitioner was supposed to wait for Holchin to return and stabilize the pile by placing the forks of his forklift under the pipe exposed by removal of the "chocked" pipes. But Petitioner did not wait. As he stepped over pipes to conduct more measurements, the pile collapsed, injuring Petitioner's leg.

Because Petitioner performed longshore operations on land appurtenant to navigable waters (known as the "twilight zone"), he was eligible for state and federal "no fault" workers' compensation benefits. Petitioner opted for, and received, Ohio workers' compensation benefits.

B. Course of Proceedings.

Less than two months after his accident, Petitioner sued Federal Marine in the Cuyahoga County Court of Common Pleas, seeking compensatory and punitive damages under Ohio's "substantial certainty" employer intentional tort. The trial court granted Federal Marine's motion for summary judgment on the grounds that Petitioner's Complaint was barred and preempted by the LHWCA. A divided Court of Appeals reversed and the Ohio Supreme Court reversed again, reinstating the trial court's judgment.[5]

The Ohio Supreme Court decision first outlines the history of the LHWCA. Originally enacted to provide "no fault" compensation for injuries on navigable waters that were not covered by state compensation statutes, the Act was amended in 1972 to protect maritime workers injured while working on land from "the consequences of filing in the wrong jurisdiction." Appx., pp. 26-27. The amendments allowed these "twilight zone" longshore workers to file for no-fault compensation benefits "in either the federal court under the LHWCA or in the state court under the state workers' compensation laws." *Id.*

The Ohio Supreme Court next outlines the tortured history of Ohio's "substantial certainty" employer intentional tort, which includes a 1982 rationale criticized by Professor Larson as "[t]he most fictitious theory of all" (Appx., p. 31, fn. 4); a 1984 expansion of

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[5] *See* Appendix to Joseph Talik's Petition for Writ of Certiorari ("Appx."), pp. 22-47.

the tort to: 1) include injuries "substantially certain" to occur; and 2) permit employees receiving workers' compensation benefits to pursue the common law tort against their employers "even though the employee had received workers' compensation benefits for the same injury" (*id.*, pp. 31-32); subsequent attempts to clarify the "confusing" substantial certainty standard (*id.*, pp. 32-33); and the Ohio General Assembly's modification of the tort by enacting a "deliberate intent" standard in 2005 – a year after Talik's injury (*id.*, pp. 33-34).

After establishing this necessary context, the Ohio Supreme Court addresses the two preemption issues before it. The Court first considers whether Petitioner's Ohio common law action is expressly preempted by § 905(a) of the LHWCA, which provides that a maritime employer's liability for "no-fault" workers' compensation benefits is "exclusive and in place of all other liability ... at law or in admiralty on account of" injury to an employee. Appx., p. 38; Pet., p. 6. Although it was undisputed that Federal Marine complied with its obligation to both contribute to the Ohio Industrial Commission and purchase a private insurance policy (for federal benefits) on behalf of Petitioner, the Court found no express preemption, concluding that because the LHWCA defines "injury" as "accidental injury" or "injury caused by the willful act of a third person," the exclusivity provision did not apply to an employer intentional tort. *Id.*, p. 39.

Implied or "conflict" preemption, however, required a different result. The Ohio Supreme Court listed three reasons for its conclusion that exposing maritime employers to "substantial certainty" tort liabilities

would act "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress in enacting the LHWCA ...." Appx., p. 45. First, those courts that have recognized a *potential*[6] intentional tort exception to the LHWCA's exclusive employer liability, have limited that exception to "specific, deliberate intent" torts. *Id.*, p. 42, ¶ 32. Second, allowing a "substantial certainty" tort action to go forward would frustrate the Congressional intent in the 1972 amendments to the LHWCA "'that compensation, not tort damages, [was] to be the primary source of relief for workplace injuries for longshoremen against their employers.'" *Id.*, p. 43, ¶ 34, quoting *Peter v. Hess Oil Virgin Islands Corp.*, 903 F.2d 935, 952 (3d Cir. 1990). Third, applying Ohio's "substantial certainty" standard "would be inconsistent with the central purpose underlying the LHWCA" to create a uniform compensation system. *Id.*, p. 44, ¶ 35.

Two Justices dissented, based in large part on their failure to distinguish between "no-fault" and "fault-based" remedies. The dissent assumes that because the longshore compensation scheme enacted by Congress recognizes concurrent state/federal jurisdiction over claims for *no-fault* benefits asserted by "twilight zone" workers, it necessarily incorporates *fault-based* state tort systems. This mixing of apples

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[6] *See, e.g., Bordelon v. Avondale Industries, Inc.*, 846 So.2d 993, 996 (La. App. 2003) ("Although some cases refer to the possibility that such an exception could be made under appropriate facts, we find none that actually did so").

and oranges was properly rejected by the five-Justice majority.

ARGUMENT

The Ohio Supreme Court's conclusion that Ohio's "substantial certainty" employer intentional tort is preempted by the LHWCA presents no question worthy of this Court's review.

A. The Concurrent State and Federal Compensation Schemes for "Twilight Zone" Longshore Workers Are Not the Subject of Unresolved Questions or Recurring Issues.

The Ohio Supreme Court has not, as suggested at page 12 of Petitioner's Petition, "decided an important issue of federal law that has not been, but should be, settled by this Court." The mutual rights and obligations of injured "twilight zone" longshore workers and their maritime employers have been settled since 1980 and are not affected by the reinstatement of summary judgment in favor of Federal Marine.

The 1972 amendments to the LHWCA and this Court's decision in *Sun Ship v. Pennsylvania*, 447 U.S. 715 (1980) extended LHWCA jurisdiction landward, thereby eliminating the state/federal jurisdictional minefields that "twilight zone" longshore workers had been previously forced to navigate to obtain no-fault benefits for their workplace injuries. Since 1980, maritime employers have funded two workers' compensation benefit schemes for their "twilight zone"

longshore employees – one state and one federal – and state and federal courts have had concurrent jurisdiction over claims asserted under those benefit schemes.

As he did in the courts below, however, Petitioner continues to confuse no-fault compensation benefits with fault-based tort law. As the Ohio Supreme Court correctly points out, the intent of the 1972 Amendments, as interpreted in *Sun Ship*, was to provide injured longshore workers with the highest available workers' compensation *benefits* – state or federal – *not* to expose maritime employers to additional liabilities imposed by state *tort* law. *See* Appx., p. 43, ¶ 34. *Accord Seide v. Bethlehem Steel Corp.*, 169 Cal. App. 3d 985, 987-89 (1985) (emphasis in original):

> Plaintiff correctly argues that *Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715 ... recognizes concurrent state and federal jurisdiction over *compensation claims* relating to injuries sustained by maritime employees .... [P]laintiff argues that because a state may apply its own workers' compensation law to claims arising under the LHWCA, it may also apply its own tort law under such concurrent jurisdiction. ... In recognizing concurrent federal and state jurisdiction over maritime compensation claims, *Sun Ship, Inc.* neither discussed tort law nor a state's power to apply its own tort law to claims arising under the LHWCA.

The Ohio Supreme Court decision preempts state *tort* claims that are inconsistent with the LHWCA, not

state *benefit* schemes that supplement the federal benefit scheme. Nothing in that decision conflicts with this Court's holding in *Sun Ship* that federal benefit schemes "supplement," rather than "supplant," state benefit schemes.

B. Nothing in the LHWCA or Cases Interpreting It Support Extending Concurrent Jurisdiction Over State and Federal Workers' Compensation Schemes to Embrace Aberrational State Tort Claims.

Petitioner's assertion that "allowing an injured longshoreman to bring a 'substantial certainty' intentional tort claim against his or her employer will not create inconsistency under the LHWCA" (Pet., p. 13), is incorrect. The LHWCA would have to be substantially gutted to accommodate such a tort action.

First, this Court would have to conclude that the Ohio substantial certainty tort is not expressly preempted by the exclusive liability provision of the LHWCA (33 U.S.C. § 905(a), Pet., p. 6).[7] Pursuant to

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[7] The Ohio Supreme Court's conclusion that the LHWCA's exclusivity provision did not expressly preempt employee intentional tort suits is questionable, but not necessary to its ultimate conclusion. The case cited to support that part of its decision (*Taylor v. Transocean Terminal Operators, Inc.*, 785 So.2d 860 (La. App. 2001)) should be strictly limited to its unusual facts. Absent access to an intentional tort claim, the longshore worker in *Taylor* would have been left "with no remedy at all" for his workplace injuries, contrary to the remedial purposes of the

§ 905(a), compliance with statutory requirements to fund no-fault benefits excludes "all other liability" for employee injuries "at law or in admiralty...." Pet., p. 6. The *only* exception to exclusive liability is if the employer "fails to secure payment of compensation as required by this chapter ...." *Id.*

Petitioner's reliance on cases analyzing the scope of exclusivity when the longshore worker seeks to assert a claim for a *non*-physical injury (*i.e.*, *Wallace v. Ryan-Walsh Stevedoring Co., Inc.*, 708 F. Supp. 144 (E.D. Tex 1989), quoted extensively at pp. 16-17 of the Petition) are irrelevant. Only a handful of states allow *non*-physical state-law torts like the retaliatory discharge claim in *Wallace*. *See, e.g.*, *Ex parte Bender Shipbuilding & Repair Co., Inc.*, 879 So.2d 577, 584 & 586 (Ala. 2003), citing federal cases and 2A Larson, Workmen's Compensation Law § 68.34(C), 13-145 to -146 (1987) to conclude that "the weight of authority" holds that state tort claims for non-physical injury are *preempted* by § 905(a). But even if correct, those cases offer no support for eroding maritime employers' exclusive liability for *physical* injuries under the LHWCA. Here, Petitioner seeks full tort damages from Federal Marine for the same physical injuries for which he is collecting no-fault workers' compensation. As the Sixth Circuit has noted, construing a federal

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LHWCA. 785 So.2d at 863-64. Here, in contrast, Petitioner is receiving workers' compensation benefits for his injuries.

exclusivity provision that is "essentially the same"[8] as § 905(a):

> We need not decide ... exactly when [the Federal Employees' Compensation Act] encompasses causes of action predicated entirely on nonphysical injury. The statute certainly provides the exclusive remedy for *all* damages arising out of [a] discrete personal injury ....
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> * * *
>
> [W]hatever the underlying state law which gives rise to the potential tort claim, FECA preempts that claim.

Saltsman v. United States, 104 F.3d 787, 790-91 (6th Cir. 1997) (emphasis in original; footnote and citations omitted).

Second, assuming arguendo that the LHWCA's exclusivity provision could permit an intentional tort suit against a compliant employer, this Court would have to conclude that the "substantial certainty" standard created by Ohio courts – as opposed to a federal common law "deliberate intent" standard[9] –

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[8] *Lockheed Aircraft Corp. v. United States*, 460 U.S. 190, 194 (1983).

[9] The LHWCA was modeled on New York's workers' compensation law. *Lockheed, supra*, 460 U.S. at 194, fn. 4. New York follows the nearly universal rule that "[n]othing short of a specific intent to injure the employee" falls outside of workers' compensation

would apply to such a cause of action. Allowing the application of Ohio's "substantially certain" standard for employer intentional torts to actions filed by longshore workers would dramatically expand employer liability under the LHWCA, disrupting "the *quid pro quo* that underlies most workmen's compensation statutes – the employer provides no-fault compensation in exchange for immunity from tort liability for damages." *Peter v. Hess Oil Virgin Islands Corp.*, 903 F.2d 935, 951 (3d Cir. 1990), citing *Morrison Knudsen Construction Co. v. Director, OWCP*, 461 U.S. 624, 636 (1983).

Third, this Court would have to conclude that Ohio's unique rule allowing employees to receive workers' compensation benefits *and* full tort damages is consistent with the language and purpose of the LHWCA. The very concept is mind-boggling. Petitioner argues that the LHWCA's exclusive liability provision cannot apply to intentional employer torts because the latter "arise outside the course of employment" and the LHWCA "encompasses only accidental injuries that arise in the course of employment." Pet., p. 1 (emphasis deleted). But it is undisputed that Federal Marine funded no-fault state and federal workers' compensation schemes for the

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exclusivity. *Houston v. Bechtel Associates Professional Corp.*, 522 F. Supp. 1094, 1095 n.4 (D.C.D.C. 1981) (holding that any intentional tort action under the LHWCA would require a specific intent to injure the employee). *Accord Boston v. Johns-Manville Sales Corp. v. Bath Iron Works Corp.*, 508 F. Supp. 313 (D. Me. 1981); *Peralta v. Perazzo*, 942 So.2d 64, 67 (La. App. 2006) ("Nothing short of a special intent to injure the employee falls outside the scope of 33 USCA 905(a)").

benefit of "twilight zone" employees injured in accidents arising in the course of their employment with Federal Marine, and Petitioner *applied for and received* such benefits. By definition, then, Petitioner's injury was "accidental" and arose in the course of his employment. Nothing in the LHWCA suggests an intent to make employers liable for *double* recoveries – one "no-fault" recovery and one "fault-based" recovery.

C. Incorporating Ohio's Aberrant Common Law Tort into the LHWCA's Compensation Scheme Would Undermine the Uniformity of Compensation that Is a Fundamental Tenet of the Act.

The Ohio Supreme Court correctly concluded that allowing longshore workers injured in Ohio to pursue a "substantial certainty" tort against their maritime employers would undermine the uniform compensation that comprises an essential tenet of the LHWCA. *See, e.g., Ex parte Bender, supra*, 879 So.2d 577 (whether described as intentional fraud or intentional infliction of emotional distress, longshore worker's state tort claim was preempted by LHWCA); *Hill v. Knapp*, 914 A.2d 1193, 1194 (Md. App. 2007) (longshore worker's state, common law action against a co-employee for injuries received "when a load of plywood dropped on him from a forklift" operated by the co-employee was preempted):

> "We can perceive no greater conflict than that which would be presented if we allowed this employee to sue his co-employee because he was a land-based maritime worker, and a maritime

> worker injured on a navigable waterway would be precluded from maintaining such a suit ...."

Id. at 1203, quoting *Fillinger v. Foster*, 448 So.2d 321, 326 (Ala. 1984).

Petitioner's argument that incorporating state tort actions will not undermine the uniformity of compensation at the heart of the LHWCA (Pet., pp. 12-14), is misplaced. The premise of his argument is that because *Sun Ship* confirmed that "twilight zone" longshore workers have the option of seeking state or federal workers' compensation benefits, and state benefit schemes vary, the LHWCA must anticipate that longshore workers injured in different locales could receive differing levels of benefits. Pet., pp. 13, 15-16. That is true, as this Court held in *Sun Ship*. But differing levels of no-fault benefits does not support the injection of state *tort* claims into the no-fault scheme of the LHWCA.

In *Sun Ship*, this Court held that the fact that state remedial schemes may be more (or less) generous than the federal remedial scheme does not cause a conflict. Both schemes are based upon "no fault" principles and a "fixed" compensation scheme:

> To be sure, if state remedial schemes are more generous than federal law, concurrent jurisdiction could result in more favorable awards for workers' injuries than under an exclusively federal compensation system. But we find no evidence that Congress was concerned about a disparity between adequate federal benefits and superior state benefits.

477 U.S. at 724 (footnote omitted). State "no fault" compensation schemes complement the Act's federal "no fault" compensation scheme because both schemes award benefits *without regard to fault*. *See Peter*, *supra*, at 952 (state and federal workers' compensation schemes are "complementary" because both "ensure that every worker [has] access to a no-fault remedy"). *Fault*-based tort claims do not complement *no-fault* benefit schemes. There is a "substantial difference between liability for a fixed and determinable compensation award and liability for unlimited damages in tort." *Id.* Such conflicts require the preemption of state tort claims, which "obstruct[] the purposes of LHWCA ...." *Id.* at 953. Petitioner is comparing "apples to oranges," when he seeks to graft a "fault-based" tort scheme onto the "no fault" scheme of the LHWCA; the Ohio Supreme Court decision is perfectly consistent with *Sun Ship*.

CONCLUSION

It has long been the law that a state law claim is preempted to the extent that it "interferes with the proper harmony and uniformity of [general maritime] law in its international and interstate relations." *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 216 (1917). That is exactly what Petitioner Talik asks this Court to do. Ohio's "substantial certainty" employer intentional tort applies a standard of liability lower than a specific, deliberate intent to harm, and allows the injured employee to seek and obtain both workers' compensation benefits and full tort benefits. Allowing longshore workers to invoke the Ohio tort in actions against their maritime employers would conflict with the language and intent of the LHWCA to establish a

uniform system of "no-fault" benefits, rather than tort recoveries, for workplace injuries. The case presents no important federal issue and certiorari should be denied.

Respectfully submitted,

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